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2007]

## Notes

### WHICH COMES FIRST IN FEDERAL COURT, THE CHICKEN OR THE BABY CHICKS?: THE UNAVAILABILITY OF FEDERAL REMEDIES FOR SPOUSAL CONSORTIUM CLAIMS UNDER 42 U.S.C. § 1983

#### I. INTRODUCTION

A line in a popular nursery rhyme sung by many school-age children is “First comes love, then comes marriage, then comes baby in a baby carriage.”<sup>1</sup> While third graders can readily identify this seemingly obvious chronology, a number of federal courts find the concept to be considerably more difficult.<sup>2</sup> The difficulty federal courts have is reflected in statutory readings and case law affording higher protection to the parent-child relationship than the relationship between spouses.<sup>3</sup>

The United States Court of Appeals for the Third Circuit lies at the center of this debate.<sup>4</sup> Even though this court held in 1985 that a parent can bring a claim for loss of consortium under 42 U.S.C. § 1983,<sup>5</sup> the same court expressly declined to consider the question of whether a spouse can bring an analogous claim for loss of consortium under the same statute in

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1. See Scott Miller, *Short Poems: Selecting A Mate* 1, [http://www.skunkwks.com/web/stories/life\\_for\\_rent/vulpine\\_poetry.php](http://www.skunkwks.com/web/stories/life_for_rent/vulpine_poetry.php) (listing common nursery rhymes) (last modified Dec. 5, 2005); cf. *Starr Taunts Clinton with Humiliating ‘Sittin’ in a Tree’ Song*, THE OXION, Oct. 28, 1998, available at <http://www.theonion.com/content/node/31943?issue=4227&special=1998> (showing rhyme to be so well known that it is foundation for popular culture parody).

2. See, e.g., *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (holding no constitutional right to spousal consortium and thus no standing for spouse to assert loss of consortium claim under 42 U.S.C. § 1983). For analysis of the illogical result that occurs when federal courts find that parent-child relationships have federal remedies under Section 1983 but spousal relationships do not, see *infra* notes 109-46 and accompanying text.

3. See, e.g., *Harbury v. Deutch*, 233 F.3d 596, 605-07 (D.C. Cir. 2000) (holding no constitutional right to spousal consortium because Supreme Court has only recognized constitutional right to familial relations in parent-child context). For an in-depth discussion of courts that give a restrictive reading of authoritative Supreme Court case law, so as to find the parent-child relationship constitutionally protected while the spousal relationship is not, see *infra* notes 36-81 and accompanying text.

4. For a discussion of the conflicting district court views within the Third Circuit regarding the status of spousal consortium claims under 42 U.S.C. § 1983, see *infra* notes 43-50, 94-105 and accompanying text.

5. 42 U.S.C.A. § 1983 (West 2007).

1993.<sup>6</sup> This issue has continued to incite debate among district courts within the circuit.<sup>7</sup>

For many people, falling in love, getting married and then having children would be ideal, although every person knows that they will encounter challenges as a spouse and as a parent because serious responsibilities accompany each role.<sup>8</sup> In recognition of the emotional, moral and legal responsibilities people undertake as spouses and parents, legal remedies are available to individuals when government action interferes with these relationships.<sup>9</sup>

The traditional family chronology dictates that a man and a woman should fall in love and then get married, thereby becoming spouses.<sup>10</sup>

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6. See *Livingstone v. N. Belle Vernon Borough*, 12 F.3d 1205, 1215 n.10 (3d Cir. 1993) (stating “[defendants] contend that . . . Mr. Livingstone’s claim for loss of consortium is not recognized under [S]ection 1983 . . . [and w]e do not consider [this] argument”); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985) (holding that father could bring claim for loss of consortium of his child under Section 1983 because he had cognizable liberty interest in preserving life of his child).

7. Compare *Norcross*, 2006 WL 1995021, at \*3 (holding that no constitutional right to spousal consortium exists, thus spouses do not have standing to assert loss of consortium claim under Section 1983), and *Colburn v. City of Phila.*, No. CIV. A. 00-2781, 2001 WL 872960, at \*2 (E.D. Pa. Apr. 11, 2001) (same); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (same); *Verde v. City of Phila.*, 862 F. Supp. 1329, 1337 (E.D. Pa. 1994) (same), with *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381-82 (E.D. Pa. 2002) (holding that fundamental rights existing in Third Circuit between parents and children under decisions like *Bailey* logically extend to spouses, so spouses can assert loss of consortium claim under Section 1983).

8. See, e.g., Katherine Bartlett, *Saving the Family from Reformers*, 31 U.C. DAVIS L. REV. 809, 815 (1998) (arguing that marriage is still considered to be “an important ideal” even in modern day society); Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 37 (2003) (“In our society, marriage is the form of intimate relationship between a man and a woman that is accorded the highest level of respect.”).

9. See *Johnston v. United States*, 85 F.3d 217, 222 (5th Cir. 1996) (finding that cause of action for wrongful death may be brought by surviving spouse, children or parents because of inherent close nature of such family relationships under Texas law); *McIntyre v. United States*, 447 F. Supp. 2d 54, 113-16 (D. Mass. 2006) (holding that mother was proper claimant under wrongful death statute for death of son); *Dillon v. Legg*, 441 P.2d 912, 921-22 (Cal. 1968) (holding that bystander could maintain cause of action for physical injuries flowing from emotional trauma of witnessing negligent injury, where bystander and plaintiff are closely related, such as spouses or children). Additionally, for discussion of the availability of the traditional loss of consortium claim in both the spousal and parent-child context, see *infra* notes 112-26 and accompanying text.

10. See Nat’l Ctr. for Policy Analysis, Idea House, *Status of the “Traditional Family,”* <http://www.ncpa.org/pd/social/spmay98d.html> (last visited Mar. 30, 2007) (citing Joyce Howard Price, *Traditional Family Nowhere Near Extinct*, WASH. TIMES, May 28, 1998, at A11) (finding that while number of married couples with minor children is declining, they still account for 35.7% of all American households); see also TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000 10 (Feb. 2003), [www.census.gov/](http://www.census.gov/)

The couple then decides to have children and become parents.<sup>11</sup> While it is unlikely that an individual would find either role as spouse or parent more important than the other, biology and the nature of traditional relationships generally involve a person becoming a spouse before taking on the role of parent.<sup>12</sup> In this respect, the spousal relationship is the lifeblood of its parental counterpart.<sup>13</sup>

Legally, the state law claim for loss of spousal consortium has naturally given rise to the more contemporary claim for loss of parental consortium.<sup>14</sup> The loss of spousal consortium claim is a traditional and common one; yet, it has undergone significant change throughout time.<sup>15</sup> This cause of action has morphed from its origin as an economic damages claim brought only by husbands, to a more emotionally based claim brought by both husbands and wives.<sup>16</sup>

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prod/2003pubs/censr-5.pdf (representing that of United States's 105.5 million households, 52% were maintained by married couples).

11. See SIMMONS & O'CONNELL, *supra* note 10 (stating that nationally, 46% of married-couple households had at least one son or daughter living within household).

12. See Miller, *supra* note 1 (listing popular children's nursery rhyme about traditional family chronology); see also SIMMONS & O'CONNELL, *supra* note 10 (noting common chronology of American families).

13. For a discussion of the history of common law spousal consortium claims giving rise to the relatively new parental consortium claims, see *infra* notes 109-26 and accompanying text.

14. See Shockley v. Prier, 225 N.W.2d 495, 497-99 (Wis. 1975) (finding that "the common law rule [where loss of consortium does not exist in the parent-child relationship] no longer fits the social realities of the present day," such that rule allowing parents to recover for loss of consortium of their children is "closer to our present day family ideal"). For further discussion of the history of the loss of parental consortium claim, see *infra* notes 109-26 and accompanying text.

15. See Perry, *supra* note 8, at 37 (noting that history of common law claim for loss of consortium was substantiated long before tort of negligent infliction of emotional distress).

16. See Johnny Parker, *Parental Consortium: Assessing the Contours of the New Tort in Town*, 64 Miss. L.J. 37, 38-39 (1994) (discussing English common law cases such as *Lynch v. Knight*, 11 Eng. Rep. 854, 863 (Ex. Ch. 1861)). Parker chronicles the early cases discussing the common law claim of loss of consortium. See *id.* (following early American construction of English common law, resulting in loss of consortium actions encompassing only economic damages belonging solely to husband, not emotional loss). These opinions were construed as giving men only the right to sue for loss of consortium, which included merely damages for loss of services; emotional damages to the spousal relationship were not recognized as actionable. See *id.* (explaining that until 1950 wives had no standing to sue for loss of spousal consortium). Eventually, loss of consortium claims expanded to allow women to bring suits on behalf of themselves. See, e.g., *Hitafter v. Argonne Co.*, 183 F.2d 811, 819 (D.C. Cir. 1950) (recognizing wife's right to bring loss of consortium claim), *overruled in part by* *Smither & Co. v. Coles*, 242 F.2d 220, 226 (D.C. Cir. 1957) (overruling *Hitafter* "insofar as it applied to Section 5 of the Longshoremen's and Harbor Workers' Act"). Loss of spousal consortium dates back to early common law, recognizing at first only the economic and sexual interest a man had in his wife. See Parker, *supra*, at 39 (discussing early American loss of consortium as arising from similar claim at English common law). The *Hitafter* court was, in fact, the first federal court in the United States to allow a woman to bring a loss of

Similar to many major additions to substantive legal rights and remedies that have occurred throughout history, courts refused to recognize claims for loss of parental consortium.<sup>17</sup> Ultimately, the argument that the emotional importance of parent-child relationships is equal to that of spousal relationships persuaded courts to grant equal legal rights to the parent-child relationship.<sup>18</sup> Thus, after decades of advocacy, the spousal

consortium claim. See *Hitaffer*, 183 F.2d at 819 (finding no compelling argument for maintaining standing restriction and, thus, holding wife can bring loss of consortium claim). In doing so, the court relied heavily on the marriage relationship itself and the benefits each spouse derives from it equally, rather than the economic resources each spouse brings to the other:

The actual injury to the wife from loss of consortium, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband and wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right arising out of the marriage relation. . . . As the wrongs of the wife are the same in principle, and are caused by acts of the same nature, as those of the husband, the remedy should be the same.

*Id.* at 816 (quoting *Bennett v. Bennett*, 23 N.E. 17, 18-19 (N.Y. 1889)) (noting mutual rights of spouses).

17. See Perry, *supra* note 8, at 37 (finding that, as of 2003, expanding loss of consortium claim to parent-child relationship is still recent development). In declining to extend the loss of consortium claim to parents and children, many jurisdictions cited an absence of statutory law. See, e.g., *Smith v. Richardson*, 171 So. 2d 96, 100 (Ala. 1965) (finding that loss of society of injured child is distinguished from loss of child's services in Alabama statute, thus loss of child's society cannot form element of damages recoverable by parent); *Butler v. Chrestman*, 264 So. 2d 812, 817 (Miss. 1972) (holding father not entitled to recover damages for loss of consortium of his daughter because Mississippi statute does not provide for such recovery); *Gilbert v. Santon Brewery*, 67 N.E.2d 155, 157 (N.Y. 1946) (holding that infant's mother was entitled to recover damages from defendant measured by pecuniary loss mother sustained, but was not entitled to be compensated for loss of companionship because companionship of child is not element of damage under New York statute); *Kalsow v. Grob*, 237 N.W. 848, 849 (N.D. 1931) (finding that father cannot recover for loss of consortium of child injured in car accident under North Dakota statute), *overruled by* *Hopkins v. McBane*, 427 N.W.2d 85 (N.D. 1988) ("[O]ne may recover damages for loss of society, comfort and companionship in an action for the wrongful death of a child."); *Quinn v. City of Pittsburgh*, 90 A. 353, 354 (Pa. 1914) (holding that loss of companionship is not element of damage in action by mother for injuries to her minor child); *McGarr v. Nat'l & Providence Worsted Mills*, 53 A. 320, 326 (R.I. 1902) (finding that in action by parent to recover for loss of services of minor, damages cannot be awarded for loss of society of minor). For discussion of the history of the claim for loss of parental consortium as a substantive expansion of the common law loss of spousal consortium claim, see *infra* notes 116-26 and accompanying text.

18. See *Shockley*, 225 N.W.2d at 497 (holding that loss of consortium claims can be brought by parents for loss of their children's society because they are more accurate gauge of modern-day relationship between parents and children); see also *Hibpschman v. Prudhoe Bay Supply, Inc.*, 734 P.2d 991, 994-97 (Alaska 1987) (hold-

consortium claim has given rise to the claim for loss of parental consortium within the last twenty years.<sup>19</sup>

ing that minor children had independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by third party); *Villareal v. Ariz. Dep't of Transp.*, 774 P.2d 213, 216-20 (Ariz. 1989) (finding that child can bring loss of consortium claim resulting from father's death in motorcycle accident); *Frank v. Superior Court of Ariz.*, 722 P.2d 955, 958-59 (Ariz. 1986) (finding that parents have cause of action for loss of consortium under Arizona law against third party who injures their adult child); *Weitl v. Moes*, 311 N.W.2d 259, 270 (Iowa 1981) (holding that minor has independent cause of action in Iowa for loss of companionship of parent who is tortiously injured by third party so as to cause significant disruption of parent-child relationship), *overruled by* *Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf R.R. Co.*, 335 N.W.2d 148, 152 (Iowa 1983) (limiting child's damages claim for loss of parental consortium to period of child's minority); *Berger v. Weber*, 303 N.W.2d 424, 425 (Mich. 1981) (finding that child has independent cause of action for loss of parental consortium when parent is negligently injured); *Lester v. Sayles* 850 S.W.2d 858, 871 (Mo. 1993) (holding most important consideration in calculating damages owed to mother when daughter was injured in train accident was mother's deprivation of enjoyment of daughter's consortium); *Keele v. St. Vincent Hosp. & Health Care Ctr.*, 852 P.2d 574, 576-78 (Mont. 1993) (holding that in Montana, minor child can establish claim for loss of parental consortium by showing mental or physical impairment in parent so severe that it causes parent-child relationship to be destroyed or nearly destroyed); *Davis v. Elizabeth Gen. Med. Ctr.*, 548 A.2d 528, 532 (N.J. Super. Ct. 1988) (holding that parents were entitled to award of \$50,000 for loss of child's consortium under New Jersey law), *overruled by* *Tynan v. Curzi*, 753 A.2d 187 (N.J. Super. Ct. App. Div. 2000) (overruling *Davis* insofar as it extends parents' right to recovery "beyond that permitted by common law"); *Gallimore v. Children's Hosp. Med. Ctr.*, 617 N.E.2d 1052, 1057 (Ohio 1993) (holding that parent may recover damages in action against third party who causes physical injury to parent's minor child, for loss of consortium); *Norvell v. Cuyahoga County Hosp.*, 463 N.E.2d 111, 114-15 (Ohio Ct. App. 1983) (holding that parents of injured minor child may recover compensation for loss of child's consortium); *Williams v. Hook*, 804 P.2d 1131, 1133-38 (Okla. 1990) (holding that minor children or incapacitated dependent children may maintain cause of action for permanent loss of parental consortium when third party injures parent); *Reagan v. Vaughn*, 804 S.W.2d 463, 465-66 (Tex. 1990) (holding that children may recover for loss of parental consortium when third party causes disabling injuries to their parent); *Hay v. Med. Ctr. Hosp.*, 496 A.2d 939, 946 (Vt. 1985) (finding that minor child has right to sue for damages for loss of parental consortium); *Adcox v. Children's Orthopedic Hosp.*, 864 P.2d 921, 932-33 (Wash. 1993) (holding mother's recovery of damages appropriate because impact of son's medical injuries on mother-son relationship); *Ueland v. Reynolds Metals Co.*, 691 P.2d 190, 195 (Wash. 1984) (expanding loss of consortium claim so that child has independent right of action for loss of parent's consortium); *Belcher v. Goins*, 400 S.E.2d 830, 841 (W. Va. 1990) (holding that any minor or physically or mentally handicapped child who is dependent on parent may maintain cause of action for loss or impairment of parental consortium against third party); *Nulle v. Gillette-Campbell County Joint Powers Fire Bd.*, 797 P.2d 1171, 1176 (Wyo. 1990) (finding that minor children have independent claim for loss of parental consortium resulting from injuries tortiously inflicted on their parents by third person). *But see* *Dep't of Pub. Welfare v. Schultz*, 855 A.2d 753, 755 (Pa. 2004) (finding no right to assert loss of parental consortium under Pennsylvania law).

19. *See Shockley*, 225 N.W.2d at 497 (finding that "the common law rule no longer fits the social realities of the present day"). Wisconsin was one of the first jurisdictions to recognize a right to parental consortium, and did so largely by

Suprisingly, though, federal courts have been more willing to recognize the loss of parental consortium claim rather than the loss of spousal consortium claim.<sup>20</sup> This anomalous result can be observed in claims asserted under 42 U.S.C. § 1983.<sup>21</sup> Under Section 1983,

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emphasizing the modern day dynamics of the parent-child relationship and similarities therein to the spousal relationship. *See id.* at 499 (“Society and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the ‘earning capacity during minority,’ which once seemed so important when the common law was originally established.”). In recognizing an actionable remedy for loss of parental consortium, courts have necessarily had to recognize that consortium is a great deal more than sexual services. *See, e.g.,* *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977) (“Certain aspects of spousal relationship are similar to those of the parent-child relationship.” (quoting *Suter v. Leonard*, 45 Cal. App. 3d 744, 746 (1975))); *Still v. Baptist Hosp., Inc.*, 755 S.W.2d 807, 812 (Tenn. Ct. App. 1988) (“When the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious. No one could seriously contend otherwise.”). Many jurisdictions have subsequently followed suit in the past two decades. *See, e.g., Frank*, 722 P.2d at 958-59 (finding that under Arizona law, parents have cause of action for loss of consortium against third party who negligently injured their adult child); *Lester*, 850 S.W.2d at 871 (holding that most important consideration in calculating damages owed to mother when daughter was injured in train accident was mother’s deprivation of enjoyment of daughter’s consortium); *Davis*, 548 A.2d at 532 (holding that parents, whose child suffered severe permanent brain damage, were entitled to award of \$50,000 for loss of child’s consortium during child’s minority under New Jersey law); *Gallimore*, 617 N.E.2d at 1057 (holding that parent may recover damages for loss of consortium, including loss of child’s services, society, companionship, comfort, love and solace); *Norvell*, 463 N.E.2d at 114-15 (holding that parents of minor child injured by tortfeasor’s negligence may recover compensation for loss of child’s consortium); *Adcox*, 864 P.2d at 932-33 (holding recovery of damages by mother appropriate because of devastating impact son’s medical injuries had on mother-son relationship).

20. *See Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985) (holding that father of child whose civil rights were violated had “cognizable liberty interest in preserving the life and physical safety of his child from deprivations caused by state action, a right that logically extends from his recognized liberty interest in the custody of his children and the maintenance and integrity of the family,” as interest described by Supreme Court opinions such as *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)); *see also Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (holding that children have right to assert claims for loss of parents’ consortium); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1237 (7th Cir. 1984) (holding that parent whose child died as result of unlawful state action may maintain action under Section 1983 for deprivation of liberty), *overruled by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (overruling *Bell* “insofar as it recognized a constitutional right to recover for the loss of companionship of an adult child when that relationship is terminated as an incidental result of state action”). *But see Harbury v. Deutch*, 233 F.3d 596, 605 (D.C. Cir. 2000) (finding no constitutional right to spousal consortium as sanctioned by Supreme Court, because Court has only recognized constitutional right to familial relations in parent-child context); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990) (finding no constitutional right to spousal consortium explicitly sanctioned by Supreme Court).

21. 42 U.S.C.A. § 1983 (West 2007).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.<sup>22</sup>

Many district and circuit courts have found a right for a parent to claim loss of consortium under Section 1983; yet, serious controversy remains over whether a spouse has the right to claim loss of consortium under the same federal statutory provision.<sup>23</sup> This controversy turns on whether the person bringing the loss of consortium claim has suffered a

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22. *Id.* The rights to have children and raise them without undue governmental interference have long been considered protected by the Due Process Clause, and as such, parents have been able to bring claims under 42 U.S.C. § 1983 for loss of parental consortium. See, e.g., *Estate of Bailey*, 768 F.2d at 509 n.7 (holding that father of child beaten to death by mother's boyfriend had "cognizable liberty interest in preserving the life and physical safety of his child from deprivations caused by state action, a right that logically extends from his recognized liberty interest in the custody of his children and the maintenance and integrity of the family"); *Bell*, 746 F.2d at 1205 (holding that parent whose child died as result of unlawful state action may maintain claim for deprivation of liberty under Section 1983). For this reason, circuit courts generally do not have difficulty recognizing a right for a parent to sue for loss of parental consortium under Section 1983 because the Supreme Court has framed a parent's constitutional right specifically as the right to have and to raise children without undue government interference. See, e.g., *Harbury*, 233 F.3d at 605 (finding that Supreme Court has only ever recognized constitutional right to familial relations in parent-child context); *Estate of Bailey*, 768 F.2d at 509 n.7 (holding that parent has constitutional liberty interest in life of his or her child); *Bell*, 746 F.2d at 1205 (finding that parents can bring claim for loss of their child's consortium under Section 1983).

23. See, e.g., *Harbury*, 233 F.3d at 605 (finding no constitutional right to spousal consortium as sanctioned by Supreme Court, because Court has only ever recognized constitutional right to familial relations in parent-child context); *Stallworth*, 893 F.2d at 838 (finding no constitutional right to spousal consortium sanctioned by Supreme Court). As a direct consequence of courts' failure to find a constitutional right to spousal consortium, these same courts hold that spouses have no right or ability to bring loss of consortium claims under Section 1983. See, e.g., *Harbury*, 233 F.3d at 605 (dismissing spouse's claim for loss of consortium under Section 1983 on summary judgment); *Stallworth*, 893 F.2d at 838 (dismissing loss of consortium claim brought under Section 1983 for failure to state claim upon which relief can be granted); see also *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994) (following First Circuit version of due process violation claim for loss of family member, in which plaintiff must show state action directly injures relationship itself); *Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986) (requiring plaintiff to show direct, intentional interference with relationship in order to find due process violation, even though right of familial relationships to be free from undue governmental interference is protected by Constitution). But see *Flores v. Cameron County*, 92 F.3d 258, 271 (5th Cir. 1996) (holding that parent can bring actionable loss of consortium claim under Section 1983 based on substantive state law, allowing for future possibility of spouses to bring similar claims because Texas state law allows such loss of consortium claims to be brought by spouses).



deprivation of a right "secured by the Constitution and laws."<sup>24</sup> Many courts have therefore concluded that parents' rights to the consortium of their children are constitutionally protected, while spouses' analogous rights to the consortium of their spouse are not.<sup>25</sup> These courts have reached this disparate conclusion despite the plethora of Supreme Court case law holding that the marriage relationship is constitutionally protected.<sup>26</sup>

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24. See 42 U.S.C.A. § 1983.

25. See *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (finding parent's right to consortium of child constitutionally protected but spouse's analogous right is not). Due to the specificity with which the Supreme Court has delineated the rights a person holds as a parent, namely the rights to have and raise children without undue interference, the idea of a loss of parental consortium claim brought under Section 1983 is not very problematic. See, e.g., *Stanley*, 405 U.S. at 651 ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum of respect." (internal quotations omitted)); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634-35 (1943) (holding that parents have constitutional right to give their children religious training and encourage them to practice it); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925) (finding that state requirement compelling children to attend public school is unconstitutional because parents have constitutional right to choose their child's schooling under Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) (holding that parents have constitutional right to raise their children without government interference, including choosing primary language child speaks). Courts have made it particularly clear that when relationships with minor children are at stake, state action at issue in a Section 1983 claim can cause undue government interference with a parent's right to have and raise his or her child. See *Estate of Bailey*, 768 F.2d at 509 n.7 (holding that parent has cognizable liberty interest in protecting life of one's minor child); *Bell*, 746 F.2d at 1245 (same). Ironically, the broad protection the Supreme Court has historically afforded the marriage relationship seems to have in fact made it more difficult for a spouse to recover loss of consortium under Section 1983. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding constitutionally mandated realm of privacy that protects marriage relationship); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress"). For a further discussion of the difficulty some courts have in finding constitutional protection for loss of spousal consortium claims, see *infra* notes 36-81 and accompanying text.

26. See, e.g., *Griswold*, 381 U.S. at 485-86 (holding that marriage relationship has constitutionally protected realm of sexual privacy because of unique and important aspects of marriage in society). Justice Douglas stated for the Court in *Griswold*:

Marriage is the coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

*Id.* at 486 (describing principles of marriage); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute requiring sterilization of felons unconstitutional because it interferes with fundamental rights to marry and pro-

The question of spousal consortium claims within the Third Circuit is further complicated by the fact that the Third Circuit has explicitly held a parent can bring a claim for loss of consortium under Section 1983 in the face of such anomalous results.<sup>27</sup> By granting a federal remedy for parental consortium claims before finding the same for spousal consortium claims, and finding the parent-child relationship constitutionally protected but not the relationship between spouses, it seems that many courts, including the Third Circuit, have forgotten that “first comes love, then comes marriage, *then* comes baby. . . .”<sup>28</sup> To put the spousal relationship on equal legal footing with the parent-child relationship, the Third Circuit should hold that claims for loss of spousal consortium can be brought under Section 1983 by finding that spousal consortium is a constitutionally protected right.<sup>29</sup> Additionally, this result would resolve the current district court split.<sup>30</sup>

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create); *Maynard*, 125 U.S. at 205 (finding right to marry constitutionally protected because it is most basic, foundational relationship of society).

27. See *Estate of Bailey*, 768 F.2d at 509 n.7 (holding that father could bring claim for loss of consortium of his child under Section 1983 because he had cognizable constitutional liberty interest in preserving life of his child). In *Estate of Bailey*, a mother's boyfriend beat her child to death after the local child and youth services agency failed to remove the child from the household despite reports of child abuse. See *id.* at 507-08. The court set forth the contents of the complaint:

The complaint alleges that [plaintiff's child] died “as a result of said defective institution's policies and procedures established, accepted and employed by York County Children and Youth Services in investigating the factors harming the child, in determining who was responsible for the child's welfare, and/or in taking appropriate steps to remedy and correct the child's environment so as to secure the child's welfare.”

*Id.* (explaining complaint). In bringing a claim under Section 1983 for the loss of consortium of his daughter, the plaintiff father asserted a deprivation of his constitutional rights. See *id.* at 508 (“[Father] allege[s] that [his child] Aleta Bailey's death from child abuse was the result of the actions of defendants who thereby deprived . . . her father of [his] constitutional rights [under Section 1983].”). The Third Circuit found the father's claim to be valid, holding that he suffered an unconstitutional deprivation of “a right that logically extends from his recognized liberty interest in the custody of his children and the maintenance and integrity of the family.” See *id.* at 509 n.7 (finding father's constitutional rights deprived by state agency that had duty to him to protect his child's life).

28. See Miller, *supra* note 1 (listing popular children's nursery rhyme about traditional family chronology) (emphasis added). For a discussion of the illogical quality of this result, as well as the practical repercussions thereof, see *infra* notes 109-46 and accompanying text.

29. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002) (holding that spouse can assert loss of consortium claim under Section 1983). For analysis of this approach to the constitutional protection of marriage, see *infra* notes 82-108 and accompanying text.

30. Compare *Norcross*, 2006 WL 1995021, at \*3 (holding no constitutional right to spousal consortium, thus no standing for spouse to assert loss of consortium claim under Section 1983), and *Colburn v. City of Phila.*, No. CIV. A. 00-2781, 2001 WL 872960, at \*2 (E.D. Pa. Apr. 11, 2001) (same); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (same); *Verde v. City of Phila.*, 862 F. Supp. 1329, 1337 (E.D. Pa. 1994) (same), with *Pahle*, 227 F. Supp. 2d at 381 (holding that rights existing in Third Circuit between parents and children under decisions like *Estate*

This Note argues that a spouse should be able to bring a claim for loss of consortium under 42 U.S.C. § 1983 for two reasons: first, because spousal consortium is already a constitutionally protected right; and second, because if it is not, spousal consortium, as the natural and logical precursor to the parent-child relationship, should be protected as an aspect of the constitutionally protected parent-child relationship.<sup>31</sup> Part II summarizes case law and supporting Supreme Court precedent in courts that find no constitutionally protected right to spousal consortium, and thus no basis for a loss of spousal consortium claim under Section 1983.<sup>32</sup> Part III summarizes case law and supporting Supreme Court precedent in those courts that do find a constitutionally protected right to spousal consortium, and thus allow claims for loss of spousal consortium under Section 1983.<sup>33</sup> Part IV examines the rise of the parental consortium claim as an offspring of the traditional common law loss of spousal consortium claim, and spousal consortium as a foundational basis for the constitutionally protected parent-child relationship.<sup>34</sup> Finally, Part V concludes with a discussion of why the Third Circuit should find that claims for loss of spousal consortium can be properly brought under Section 1983, in light of both Supreme Court precedent supporting the marriage relationship and policy considerations.<sup>35</sup>

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of *Bailey* logically extend to spouses, so spouse can assert loss of consortium claim under Section 1983). For a discussion of the illogical results that arise from granting a federal remedy for loss of parental consortium claims without providing a federal remedy for loss of spousal consortium claims, see *infra* notes 109-46 and accompanying text. For a discussion of the problems that result from a lack of a federal remedy for loss of spousal consortium claims, including further detriment to the spousal relationship, see *infra* notes 147-55 and accompanying text.

31. For a discussion of clear Supreme Court rulings that set out the constitutional protection of the marriage relationship and demonstrate why parties should be able to bring loss of spousal consortium claims under 42 U.S.C. § 1983, see *infra* notes 51-56, 85-93 and accompanying text.

32. For a discussion of the courts that do not allow plaintiffs to bring loss of spousal consortium claims under 42 U.S.C. § 1983 because they do not find spousal consortium to be an individual fundamental right protected by the Constitution, see *infra* notes 36-81 and accompanying text.

33. For analyses of court opinions that do find loss of spousal consortium claims can properly be brought under 42 U.S.C. § 1983 because spousal consortium is an aspect of the constitutionally protected marriage relationship, see *infra* notes 82-108 and accompanying text.

34. For a historical synopsis of loss of spousal consortium claims as the foundation for loss of parental consortium claims, and thus the logical precursor to such claims under 42 U.S.C. § 1983, see *infra* notes 109-46 and accompanying text.

35. Loss of spousal consortium claims are a practical necessity, and for arguments as to the practical necessity of an available federal remedy under 42 U.S.C. § 1983 for such claims, see *infra* notes 147-55 and accompanying text.

## II. NO CONSTITUTIONAL CONSORTIUM: THE NARROW VIEW OF MARRIAGE AS A SUBSTANTIVE CONSTITUTIONAL RIGHT

Many district and circuit courts do not recognize spousal consortium as a constitutionally protected right and find that a claim for loss of spousal consortium cannot be brought under Section 1983.<sup>36</sup> These courts hold, as the primary logic of this position, that because spousal consortium is not a right expressly “secured by the Constitution and laws,” it is not an injury for which Section 1983 provides a remedy.<sup>37</sup> Such courts rely heavily on Supreme Court precedent that has historically held that only individuals who suffer an actual deprivation of their personal rights can sue under Section 1983; therefore, no derivative claims or lawsuits can be brought under the statute.<sup>38</sup> The foundation of this argument is that any assertion for loss of spousal consortium under Section 1983 is a claim

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36. *See, e.g., Harbury v. Deutch*, 233 F.3d 596, 605 (D.C. Cir. 2000) (holding that there is no constitutional right to spousal consortium because Supreme Court has only ever recognized constitutional right to familial relations in parent-child context); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990) (finding that although Supreme Court has recognized constitutional protection for rights to marry, to have children and to direct their education, Court has never sanctioned constitutional protection for consortium); *Norcross v. Town of Hammon-ton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (finding no constitutional right to spousal consortium exists, thus no standing for spouse to assert loss of consortium claim under Section 1983); *Colburn v. City of Phila.*, No. CIV. A. 00-2781, 2001 WL 872960, at \*2 (E.D. Pa. Apr. 11, 2001) (same); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (same); *Verde v. City of Phila.*, 862 F. Supp. 1329, 1337 (E.D. Pa. 1994) (same).

37. *See Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976) (emphasizing that Section 1983 permits imposition of liability “only for conduct which ‘subjects, or causes to be subjected’ the complainant to a deprivation of a right secured by the Constitution and laws”); *Duchesne v. Sugarman*, 566 F.2d 817, 831 (2d Cir. 1977) (finding that “a [Section] 1983 plaintiff’s burden . . . [is to] prove that the defendant caused him to be subjected to a deprivation of constitutional rights”); *O’Malley v. Brierley*, 477 F.2d 785, 789 (3d Cir. 1973) (holding that one may not recover damages under Section 1983 for violation of another’s civil rights). Whether a spouse can assert a claim for loss of consortium under Section 1983 necessarily turns on whether a court finds spousal consortium to be constitutionally protected or not. *See, e.g., Harbury*, 233 F.3d at 605 (dismissing widow’s claim for loss of consortium under Section 1983 because there is no constitutional right to spousal consortium); *Stallworth*, 893 F.2d at 838 (finding that spouse cannot assert claim for loss of consortium because although Supreme Court has recognized constitutional protection for rights to marry, to have children and to direct their education, Court has never sanctioned constitutional protection for consortium).

38. *See O’Malley*, 477 F.2d at 785 (holding that one may not recover damages under Section 1983 for violation of another’s civil rights); *see also Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002) (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)) (explaining that it has long been held that only individuals who suffer actual deprivation of their personal rights can sue under 42 U.S.C. § 1983, so that no derivative claims or law suits can be brought under Section 1983).

derivative of the actual civil rights injury, because there is no right to spousal consortium under the "Constitution and laws."<sup>39</sup>

Therefore, these courts will not likely permit an individual to assert a loss of spousal consortium claim under Section 1983 unless the Supreme Court explicitly recognizes spousal consortium as a constitutionally protected right.<sup>40</sup> Until that time, such courts maintain that spousal consortium is not a right "secured by the Constitution and laws," such that if deprived by government action, individuals have no constitutional redress.<sup>41</sup> Thus, the language of Section 1983 provides no remedy for that particular loss or injury, and the injured spouse is further precluded because no derivative claims are available under Section 1983.<sup>42</sup>

A. Norcross v. Town of Hammonton: *The District of New Jersey's Restrictive Approach to Loss of Spousal Consortium*

Another argument for why loss of spousal consortium claims are not permitted under Section 1983 is that the expansion of the rights and interests protected by substantive due process and the Constitution warrants extreme caution.<sup>43</sup> The United States District Court for the District of

39. See *Harbury*, 233 F.3d at 605 (holding that Supreme Court has only ever recognized constitutional right to familial relations in parent-child context); *Stallworth*, 893 F.2d at 838 (holding that Supreme Court has never sanctioned constitutional protection of consortium).

40. See *Harbury*, 233 F.3d at 605 (holding no constitutional right to consortium in spousal context because it would be too great expansion of existing substantive constitutional rights); *Norcross*, 2006 WL 1995021, at \*2 ("While the Supreme Court has recognized constitutional protection for 'rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion,' the Court has never sanctioned constitutional protection of consortium.").

41. See 42 U.S.C.A. § 1983 (West 2007) (describing rights protected by federal law).

42. See *Rizzo*, 423 U.S. at 370-71 (emphasizing that Section 1983 permits imposition of liability "only for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws"); *O'Malley*, 477 F.2d at 789 (holding that one may not recover damages under Section 1983 for violation of another's civil rights); see also *Pahle*, 227 F. Supp. 2d at 381 (citing *McGowan v. Maryland*, 366 U.S. 420 (1961)) (finding that only individuals who suffer actual deprivation of their personal rights can sue under Section 1983).

43. See *Collins v. Harker Heights*, 503 U.S. 115, 126 (1992) (declining to expand substantive constitutional rights to include right to safe working environment); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985) (holding that student's dismissal from academic program did not amount to constitutional violation because no constitutional right in one's personal academic investment exists). In describing why it is so important to exercise caution when in the realm of substantive expansion of constitutional rights, the *Collins* Court stated:

As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever [the Court is] asked to break new ground in this field.

New Jersey, for example, felt it reached the correct conclusion in *Norcross v. Town of Hammonton*<sup>44</sup> when it held that “[w]hile the Supreme Court has recognized constitutional protection for ‘rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion,’ the Court has never sanctioned constitutional protection of consortium.”<sup>45</sup> In *Norcross*, Geraldine Singletary sued the town of Hammonton, New Jersey for the use of excessive force against her in the course of an arrest under 42 U.S.C. § 1983.<sup>46</sup> Her husband, Robert Singletary, brought a claim for loss of consortium under the same statute.<sup>47</sup>

The court granted partial summary judgment for the town of Hammonton on Robert Singletary’s claim on the grounds that his claim was not cognizable under 42 U.S.C. § 1983.<sup>48</sup> The court’s reasoning provided an extremely nuanced view of substantive constitutional rights, stating that “constitutional protection of privacy is not equivalent to constitutional protection of the relationship; nor is consortium equivalent to marriage.”<sup>49</sup> Unfortunately, this line of reasoning is extremely narrow and

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*Collins*, 503 U.S. at 125 (citations omitted).

44. Civil No. 04-2536 (RBK), 2006 WL 1995021 (D.N.J. July 13, 2006).

45. *Id.* at \*2 (holding that no constitutional right to spousal consortium exists under substantive due process doctrine as it has been set forth by Supreme Court).

46. *See id.* at \*1 (discussing plaintiff’s claims arising from arrest by local law enforcement, alleging “excessive force in addition to various common law torts”).

47. *See id.* (“Plaintiff Robert Singletary . . . alleges loss of consortium resulting from the events surrounding the arrest of his wife [under 42 U.S.C. § 1983].”).

48. *See id.* at \*3 (granting partial summary judgment to defendants on grounds that no constitutional right to spousal consortium exists). In the alternative, the United States District Court for the District of New Jersey also granted partial summary judgment to the town of Hammonton based on the fact that plaintiff Robert Singletary could not show that the actions of the arresting officers were specifically intended to harm his spousal relationship with his wife. *See id.* at \*2 n.4 (“[I]n the alternative [Hammonton is] entitled to partial judgment because [officer’s] actions in arresting Geraldine Singletary were not directed toward the spousal relationship between Plaintiff Robert Singletary and his arrested wife.”). For a further discussion and analysis of this heightened evidentiary standard and the courts that implement it, see *infra* notes 69-81 and accompanying text.

49. *See id.* at \*3 (explaining reasoning for why loss of spousal consortium claims cannot be brought under 42 U.S.C. § 1983, including supposed absence of Supreme Court precedent finding spousal consortium constitutionally protected). The *Norcross* court criticized the *Pahle* court for relying on Supreme Court precedent protecting privacy in the marital relationship and concluded that “marital integrity and spousal association implicate constitutional due process rights.” *See id.* (citations omitted) (noting that privacy in marriage relationship is not identical to consortium, thus constitutional protection of marriage does not necessarily flow directly to spousal consortium); see also *Niehus v. Liberio*, 973 F.2d 526, 533 (7th Cir. 1992) (noting that “consortium is not a synonym for marriage. It is the name of the sexual and other services . . . that spouses render to each other” and “[t]he right to a husband’s assistance in raking leaves is not a liberty protected by the Fourteenth Amendment”).

does not give deference to the full scope of rights the Supreme Court has already found to be well-protected by the Constitution.<sup>50</sup>

B. *The Long Wait for Supreme Court Protection of "Spousal Consortium"*

Historically, the Supreme Court has unambiguously established that the rights to marry and to have privacy in the marital relationship are constitutionally protected.<sup>51</sup> It is therefore redundant for lower courts to hold that it is necessary for the Court to explicitly state that spousal consortium is protected by the Constitution.<sup>52</sup> When the Supreme Court protected marriage and privacy within marriage, it protected all aspects of

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50. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("[T]his Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment.") (summarizing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family."); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (holding that marriage relationship has constitutionally protected realm of sexual privacy because of importance of marriage in society in addition to unique association between spouses); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (recognizing history of Supreme Court decisions that have respected fairly larger private realm of family life that state cannot enter); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that Fourteenth Amendment protects "freedom to marry, establish a home and bring up children"); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress").

51. See *Griswold*, 381 U.S. at 485-86 (holding that marriage relationship is included in constitutionally protected realm of sexual privacy); *Maynard*, 125 U.S. at 205 (finding the right to marry constitutionally protected); see also *Perry*, *supra* note 8, at 32 (discussing realm of sexual privacy that protects marriage relationship).

52. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381-82 (E.D. Pa. 2002) (holding that right to assert loss of parental consortium under Section 1983 "logically extend[s] to spouses"). The *Pahle* court gave Supreme Court holdings regarding constitutional marriage the logical scope they deserve. See *id.* at 382 ("[W]e believe the Supreme Court's language concerning the institution is equally apt when applied to the Due Process rights implicated here: marital integrity and spousal association."). For a discussion of this opinion and its analysis of loss of spousal consortium claims under Section 1983, see *infra* notes 94-105 and accompanying text.

Additionally, several historic Supreme Court holdings protecting marriage implicate, if not explicitly mention, aspects of the marriage relationship such as sexual relations and companionship that are the integral elements of spousal consortium. See, e.g., *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected significant private realm of family life which state cannot enter); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that state statute requiring sterilization of felons unconstitutional because it interferes with individual fundamental rights to marry and procreate).

marriage, especially those that are most private between spouses.<sup>53</sup> Consortium is material to privacy within the marital relationship.<sup>54</sup> Courts that require the Supreme Court to state that spousal consortium is protected by the Constitution ask the Court to repeat a clear and historic holding.<sup>55</sup> Finding constitutional protection through due process for spousal consortium does not expand the realm of substantive constitutional rights; it is merely one aspect of a right long recognized.<sup>56</sup>

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53. See *Santosky*, 455 U.S. at 753 (noting “this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”) (summarizing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Griswold*, 381 U.S. at 486 (holding that sexual privacy of marriage relationship is constitutionally protected due to sanctity and importance of marriage relationship); *Poe*, 367 U.S. at 551-52 (“The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.”); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected aspects of private realm of family life that state cannot enter); *Meyer*, 262 U.S. at 399 (finding that Fourteenth Amendment protects “freedom to marry, establish a home and bring up children”). Despite the clear Supreme Court precedent protecting the marriage relationship, it is undeniable that the broad language the Court has used has been problematic for spouses attempting to assert a loss of consortium claim under Section 1983. It is difficult to assert this right because of the explicit language courts look for when considering what rights are specifically protected by the Constitution and what rights are not. See, e.g., *Harbury v. Deutch*, 233 F.3d 596, 607 (D.C. Cir. 2000) (holding that widow’s Section 1983 claim for loss of spousal consortium failed because her claim lacked “foundation in constitutional jurisprudence” where she relied upon broad constitutional language in *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992), which asserted that there is “private realm of family life” protected by Fourteenth Amendment).

54. See *Griswold*, 381 U.S. at 486 (holding that marriage relationship is surrounded by constitutionally protected realm of sexual privacy because of important role of marriage in society); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected private realm of family life that state cannot enter because of important place family relationships occupy in society); see also Perry, *supra* note 8, at 32 (discussing realm of sexual privacy protecting marriage relationship).

55. See *Harbury*, 233 F.3d at 605-06 (holding that there is no constitutional right to spousal consortium because Supreme Court has only recognized constitutional right to familial relations in parent-child context); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990) (finding that although Supreme Court has recognized constitutional protection for rights to marry, to have children and to direct their education, Court has never expressly sanctioned constitutional protection for spousal consortium, thus such constitutional protection does not exist); *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (finding no constitutional right to spousal consortium, thus no standing for spouse to assert loss of consortium claim under Section 1983); *Colburn v. City of Phila.*, No. CIV. A. 00-2781, 2001 WL 872960, at \*2 (E.D. Pa. Apr. 11, 2001) (same); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (same); *Verde v. City of Phila.*, 862 F. Supp. 1329, 1337 (E.D. Pa. 1994) (same).

56. See *Griswold*, 381 U.S. at 486 (protecting marriage relationship and communications between spouses with realm of sexual privacy). While there is no completely agreed upon definition of “spousal consortium,” it is widely thought to include the comfort, companionship and conjugal society of a spouse to the other.



A second argument prevalent in court opinions that do not find spousal consortium to be constitutionally protected is that because the Supreme Court has only ever recognized a constitutional right to familial relations in the parent-child context, it simply does not exist in the spousal context.<sup>57</sup> For example, in *Harbury v. Deutch*,<sup>58</sup> plaintiff Jennifer Harbury, a widow, brought an action under 42 U.S.C. § 1983 against the Central Intelligence Agency for the wrongful death and loss of consortium of her husband.<sup>59</sup> Harbury argued that loss of consortium claims under Section 1983 logically extend from the parent-child context, to encompass the spousal context as well.<sup>60</sup>

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See Parker, *supra* note 16, at 41-42 (defining spousal consortium and explaining that interference with spouse's right to consortium violates not only natural right but also spouse's legal right arising out of marriage relationship).

57. See, e.g., *Santosky*, 455 U.S. at 758, 768-70 (holding that prosecution must make higher evidentiary showing of child neglect to terminate parental rights because they are protected by Constitution); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (finding that unwed fathers have constitutional right to custody of their children upon mother's death). One major way the Supreme Court has found the Constitution protects familial relationships from undue government interference is by holding that parents have a constitutional right to maintain their relationship with their children. See *Santosky*, 455 U.S. at 760 (holding that parent has constitutional right to custody of children until state can affirmatively prove parent is unfit); *Stanley*, 405 U.S. at 651 (finding that father has constitutional right to custody of children upon mother's death because of importance of parent-child relationship). The Supreme Court has also protected parental rights by affording parents primary control over the raising of their children. See *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding that parents have constitutional right to give their children religious training and encourage them to practice it); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 532 (1925) (finding that state requirement compelling children to attend public school unconstitutional because parents have constitutional right to choose their children's schooling under Fourteenth Amendment); *Meyer*, 262 U.S. at 390 (holding that parents have constitutional right to raise their children without government interference, including language child speaks).

58. 233 F.3d 596 (D.C. Cir. 2000).

59. See *id.* at 598 (discussing plaintiff's claims under Section 1983 against government agencies for alleged involvement in torture and death of her husband). Harbury claimed that Central Intelligence Agency (CIA) officials took part in the torture and murder of her husband, a Guatemalan citizen. See *id.* (reciting facts of plaintiff's claims, particularly that plaintiff's husband was captured, detained and abused by CIA-supported Guatemalan Security Forces). In seeking damages, Harbury filed in federal court and claimed violation of her right to familial association. See *id.* (detailing most pertinent of plaintiff's twenty-eight specific causes of action against CIA defendants).

60. See *id.* at 604-05 (alleging unconstitutional deprivation of right to continuing association with husband). Harbury argued that the holdings of cases such as *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992), that protected intimate personal choices within a realm of privacy, should consequently protect the personal and familial private decisions made as part of the consortium in her marriage. See *Harbury*, 233 F.3d at 607 (citing broad Supreme Court protections of privacy, personal choices, as well as liberty under Fourteenth Amendment).

In declining to grant such an extension, the United States Court of Appeals for the District of Columbia Circuit relied heavily on an exacting view of Supreme Court precedent.<sup>61</sup> The District of Columbia Circuit found that the Supreme Court has only explicitly held that the Constitution protects the substantive right parents have to maintain their relationship with their children, and has never stated that the Constitution protects an analogous right in spouses to maintain their relationship with their husband or wife.<sup>62</sup> Therefore, the circuit court reasoned, only parental consortium is a constitutional right; spousal consortium is not.<sup>63</sup>

This approach, similar to the approach by the District Court of New Jersey, excessively limits existing constitutionally protected rights.<sup>64</sup> By giving prior Supreme Court holdings a narrow reading, these courts do not give established rights their fair weight and deference, and they ask

61. See *Harbury*, 233 F.3d at 606 (citing *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)) (reiterating warning from *Collins* that judicial restraint must be exercised when considering expanding liberty interests protected by substantive due process).

62. See *id.* (declining to expand substantive due process to encompass loss of spousal consortium). The court expressly noted that “the Supreme Court has recognized a right to continuing familial association only in cases involving parent-child relationships. In doing so, the Court has emphasized the importance of the parent-child bond.” *Id.* (finding that individual’s liberty interest in relationships with others does not extend beyond parent-child context, even to other closely held familial relations).

63. See *id.* at 606-07 (dismissing widow’s loss of consortium claim under Section 1983 for lack of foundation in constitutional jurisprudence). In reaching its conclusion, the *Harbury* court relied heavily on the First Circuit opinion in *Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986). See *Harbury*, 233 F.3d at 606 (“The First Circuit, declining to extend due process protection to incidental deprivations of familial association, used language we think particularly compelling.”). In *Ortiz*, the First Circuit stated:

[We] seek neither to minimize the loss of a family member nor to denigrate the fundamental liberty interest in matters of family life that has long been a part of our constitutional fabric. . . . But even an interest of great importance may not always be entitled to constitutional protection. *Ortiz*, 807 F.2d at 10 (explaining rationale for not recognizing claim for loss of spousal consortium).

64. See *Roe v. Wade*, 410 U.S. 113, 152 (1973) (holding decision to procreate as constitutionally private to woman herself, or as between spouses); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that marriage relationship and spousal communications have constitutionally protected realm of sexual privacy because of their importance to society); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (recognizing history of Supreme Court decisions that have respected aspects of private realm of family life that state cannot enter); *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (finding right to marry constitutionally protected because, among other things, “[marriage is] the foundation of the family and of society, without which there would be neither civilization nor progress”). Not all district courts within the Third Circuit limit the constitutional protection of marriage in this way. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002) (holding that rights existing between parents and children “logically extend[ ]” to spouses, thus spouse can assert loss of consortium claim under Section 1983). For a further discussion of courts that do not limit the constitutional protections of marriage, see *infra* notes 82-108 and accompanying text.

the Court to repeat what it has already stated.<sup>65</sup> While it may be true that the context in which the Supreme Court has held that familial relations were constitutionally protected was that of the parent-child relationship, it does not alter the fact that “familial relations” logically and plainly include the relationships between spouses in addition to those between parents and children, just as “marital privacy” logically and plainly includes spousal consortium.<sup>66</sup> Therefore, courts that hold spousal consortium is not constitutionally protected ignore the Supreme Court’s recognition of the necessity for prudent expansion of substantive rights.<sup>67</sup> They instead constrict established rights by failing to recognize them within their logical scope.<sup>68</sup>

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65. See *Roe*, 410 U.S. at 152-53 (holding decision to have or not have children constitutionally private to woman herself, or to woman and spouse); *Griswold*, 381 U.S. at 479 (holding that constitutionally private decision to use contraception is part of realm of sexual privacy).

66. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting “this Court’s historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment”) (summarizing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (“Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation’s history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.”); *Griswold*, 381 U.S. at 496 (emphasizing that “the traditional relation of the family [is] a relation as old and as fundamental as our entire civilization”); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) (“The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right.”); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected private realm of family life that state cannot enter); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that Fourteenth Amendment protects “freedom to marry, establish a home and bring up children”); see also *Perry*, *supra* note 8, at 32 (discussing realm of sexual privacy that protects marriage relationship). Even if the only constitutionally protected aspects of marriage are the decision to marry and to make private family decisions, spousal division of labor and deciding whether to have children also may be severely impacted and restricted as elements of a loss of consortium claim because loss of consortium includes economic elements, socioemotional elements and sexual elements. See *Parker*, *supra* note 16, at 41-42 (defining spousal consortium to include spousal comfort, companionship and conjugal society).

67. See *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (declining to expand substantive constitutional rights to afford individual constitutional right to safe working environment because “[t]he doctrine of judicial self-restraint requires us to exercise the utmost care”).

68. Compare *Harbury*, 233 F.3d at 604 (refusing to extend constitutional right of familial association to case in which government indirectly interfered with spousal relationship by allegedly murdering woman’s husband), and *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (“While the Supreme Court has recognized constitutional protection for ‘rights to marry, to have children, to direct the education and upbringing of one’s children, to marital privacy, to use contraception, to bodily integrity, and to abortion,’ the Court has never sanctioned constitutional protection of consortium.”), with *Moore*, 431 U.S. at 503-04 (“Our decisions establish that the Constitu-

C. *The "Creative Requirements" Approach to Loss of Spousal Consortium*

Finally, several courts restrict individuals' ability to bring loss of spousal consortium claims under Section 1983 by placing unwarranted burdensome requirements on these claims.<sup>69</sup> Although these courts do not explicitly deny the possibility of a loss of spousal consortium claim under Section 1983, they greatly limit the probability of their success because plaintiffs must make a very high evidentiary showing to even get past summary judgment.<sup>70</sup> Specifically, the United States Courts of Appeals for the First and Fourth Circuits have held that although the right to private familial relationships is protected by the Due Process Clause, a plaintiff must show direct, intentional interference with the relationship for a constitutional violation to exist.<sup>71</sup>

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tion protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."); *Griswold*, 381 U.S. at 496 (emphasizing that "the traditional relation of the family [is] a relation as old and as fundamental as our entire civilization"); *Poe*, 367 U.S. at 551-52 (Harlan, J., dissenting) ("The home derives its preeminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected aspects of private realm of family life which state cannot enter).

69. See, e.g., *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994) (holding that mother's claim for loss of consortium of son who was killed by state trooper was not cognizable because "the Supreme Court has never extended the constitutionally protected liberty interest incorporated by the Fourteenth Amendment Due Process Clause to encompass deprivations resulting from governmental actions affecting the family only incidentally"); *Ortiz v. Burgos*, 807 F.2d 6, 8 (1st Cir. 1986) (holding that right to familial relationships free from undue government interference is protected by Constitution, but that plaintiff must show direct, intentional interference with relationship in order to find due process violation).

70. See, e.g., *Shaw*, 13 F.3d at 804-05 (holding that district court properly granted summary judgment in favor of defendants on plaintiffs' substantive due process claim); *Harpole v. Ark. Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (dismissing grandmother's claim for loss of grandson's consortium for failure to state claim upon which relief can be granted); *Ortiz*, 807 F.2d at 7 (dismissing plaintiff's loss of consortium claim under Section 1983 on summary judgment).

71. See, e.g., *Shaw*, 13 F.3d at 804-05 (holding that mother's loss of consortium claim under Section 1983 had no cause of action because Supreme Court has never extended constitutional protection of family relationships to encompass deprivations resulting from governmental actions only incidentally affecting family); *Ortiz*, 807 F.2d at 8 (holding stepfather's claim for loss of stepson's consortium under Section 1983 had no cause of action because beating was not specifically intended to deprive stepfather of association with stepson).

The First Circuit's use of this high standard has greatly limited loss of consortium claims in that jurisdiction.<sup>72</sup> For example, in *Ortiz v. Burgos*,<sup>73</sup> a stepfather, mother and siblings sued prison authorities under 42 U.S.C. § 1983 for the loss of consortium of their son and brother when he was beaten to death by prison guards.<sup>74</sup> In holding that the stepfather and siblings did not have a constitutionally protected interest in the companionship of the deceased, the First Circuit declined "to make the leap ourselves from the realm of governmental action directly aimed at the relationship between a parent and a young child to an incidental deprivation of the relationship between appellants and their adult relative."<sup>75</sup> The First Circuit, thus, created a higher standard for Section 1983 loss of consortium claims than the Supreme Court has ever called for, requiring parties to show a direct, intentional interference with the relationship at issue.<sup>76</sup>

Placing this high burden on plaintiffs is unwarranted and contrary to the plain language of the Supreme Court's repeated holdings that familial relationships are constitutionally protected.<sup>77</sup> The Court has always held that these relationships should be and are protected from governmental

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72. See, e.g., *Soto v. Flores*, 103 F.3d 1056, 1061 (1st Cir. 1997) (dismissing loss of consortium under Section 1983 for failure to show intentional deprivation of the familial relationship); *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 563 (1st Cir. 1988) (same); *Ortiz*, 807 F.2d at 8 (same).

73. 807 F.2d 6 (1st Cir. 1986).

74. See *id.* at 7 (discussing plaintiffs' claims).

75. *Id.* at 9 (drawing distinction between substantive due process cases involving parent-child relationship and other familial relationships).

76. See *id.* (discussing heightened evidentiary requirement placed on plaintiffs to make valid constitutional argument for loss of consortium claims brought under 42 U.S.C. § 1983). The Supreme Court has never expressly required a plaintiff bringing a claim for constitutional violations of the family relationship to show intentional interference with the relationship. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) ("Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

77. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting "this Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment") (summarizing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Moore*, 431 U.S. at 503-04 (recognizing constitutional protection of family exists because institution of family is integral to society); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (emphasizing that "the traditional relation of the family [is] a relation as old and as fundamental as our entire civilization"); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (recognizing history of Supreme Court decisions that have respected aspects of private realm of family life which state cannot enter); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding that Fourteenth Amendment protects "freedom to marry, establish a home and bring up children").

interference, and has never required a showing of intentional interference.<sup>78</sup> While the Court may have found undue interference with protected familial relationships where that interference was, in fact, intentional or direct, the Court has never expressly placed such a high evidentiary burden on a plaintiff asserting infringement of a constitutional right.<sup>79</sup> It is wrong for lower courts to create such a standard.<sup>80</sup> This ap-

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78. See, e.g., *Santosky*, 455 U.S. at 748 (requiring high burden on states to show justification for terminating parental rights by clear and convincing evidence); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting) (stating that "although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment" so state must make high evidentiary showing before validly infringing on such rights); *Moore*, 431 U.S. at 501-02 (finding that basic reasons constitutional rights are associated with family guarantees family relationships to be free of arbitrary state interference regardless of state intent); *Griswold*, 381 U.S. at 484 (stating that Constitution protects "against all government invasions 'of the sanctity of a man's home and the privacies of life'" (emphasis added)); *Poe*, 367 U.S. at 551-52 (Harlan, J., dissenting) (finding that more than one explicit constitutional right protects family life from undue state interference regardless if interference is intentional or not); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected private realm of family life which state cannot enter but failing to mention requirement of intentional interference by state); *Meyer*, 262 U.S. at 399 (finding that Fourteenth Amendment protects not only freedom from bodily harm, but also "freedom to marry, establish a home and bring up children" without undue interference, regardless of state intention).

79. See, e.g., *Moore*, 431 U.S. at 502 (finding that right to private family relationships is free from all substantial arbitrary impositions); *Griswold*, 381 U.S. at 485 (stating that right to privacy is essence of constitutional liberty so that sanctity of private home life is protected against all government invasions); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (holding that state requirement of public education directly interferes with parents' constitutional right to control upbringing of their children). Conversely, in fact, the Supreme Court has frequently placed a high burden on the state to show valid action infringing upon the constitutionally-protected family rights. See, e.g., *Santosky*, 455 U.S. at 748 (holding that state action to terminate constitutionally protected parental rights requires clear and convincing evidentiary showing); *Lassiter*, 452 U.S. at 38-39 (Blackmun, J., dissenting) (finding that termination of parental rights directly interferes with constitutionally protected parent-child relationship, thus state must make high evidentiary showing for action to be valid); *Little v. Streater*, 452 U.S. 1, 16-17 (1981) (holding that state fee for paternity test intrudes upon constitutionally protected parental rights); *Wisconsin v. Yoder*, 406 U.S. 205, 232-33 (1972) (holding parents' constitutional interests in children's education are more protected than state's interest, even when children themselves support state's interest); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (declaring Illinois statute presuming unfitness of unwed fathers "constitutionally repugnant" for violation of protected parental rights).

80. See, e.g., *Shaw v. Stroud*, 13 F.3d 791, 804-05 (4th Cir. 1994) (declining to extend substantive constitutional rights to situations where no direct interference by government takes place); *Harpole v. Ark. Dep't of Human Servs.*, 820 F.2d 923, 927-28 (8th Cir. 1987) (same); *Ortiz v. Burgos*, 807 F.2d 6, 8-9 (1st Cir. 1986) (finding no independent cause of action for loss of familial association to exist where injury was not specifically intended to deprive stepfather of his association with stepson); *Trujillo v. Bd. of County Comm'rs of the County of Santa Fe*, 768 F.2d 1186, 1188-90 (10th Cir. 1985) (finding that siblings have actionable claim

proach goes beyond “prudent expansion” of substantive rights to an unwarranted restricting of plaintiffs’ ability to protect their own constitutional rights through legal redress.<sup>81</sup>

### III. CONSTITUTIONAL PROTECTION OF SPOUSAL CONSORTIUM: THE LOGICAL READING OF MARRIAGE AS A SUBSTANTIVE CONSTITUTIONAL RIGHT

Courts on the other side of this debate also rely upon Supreme Court precedent to support their position that a constitutional right to spousal consortium exists.<sup>82</sup> These courts do not expand the existing realm of substantive constitutional rights, but instead follow the existing precedent that has historically protected the marriage relationship to its logical conclusion.<sup>83</sup> This reading finds that spousal consortium is an integral aspect of marriage, and therefore it is protected by the same constitutional provisions and Supreme Court rulings that protect the marriage institution and relationship in general.<sup>84</sup>

#### A. *Constitutional Precedent Protecting the Marriage Relationship*

Explicit Supreme Court support and protection of the marriage relationship dates back to 1888, when the Supreme Court noted in *Maynard v. Hill*<sup>85</sup> that “marriage is the most important relation in life” and that it is

under Section 1983 for loss of family member, but only if they allege intentional deprivation of rights).

81. See *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (warning that expansion of substantive due process rights requires judicial self-restraint).

82. See *Griswold*, 381 U.S. at 485-86 (holding that private decisions by married couples, such as whether to use contraception, are protected by realm of sexual privacy in which government should not interfere); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress”).

83. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381-82 (E.D. Pa. 2002) (holding that same rights existing in Third Circuit between parents and children logically extend to spouses, thus spouse can assert loss of consortium claim under Section 1983). The *Pahle* court recognized the long history of Supreme Court precedent protecting the institution of marriage generally. See *id.* at 382; see also *Roe v. Wade*, 410 U.S. 113, 153 (1973) (holding decision to procreate as constitutionally private to woman or as between spouses); *Griswold*, 381 U.S. at 486 (holding that marriage relationship needs constitutionally protected realm of sexual privacy); *Prince*, 321 U.S. at 167 (recognizing history of Supreme Court decisions that have respected private realm of family life, including spousal relationship, which state cannot enter); *Maynard*, 125 U.S. at 205, 211 (finding right to marry constitutionally protected because, among other things, “marriage is the most important relation in life” and “[marriage is] the foundation of the family and of society, without which there would be neither civilization nor progress”).

84. See *Pahle*, 227 F. Supp. 2d at 381 (finding that “Third Circuit precedent suggests that a husband or wife should be able to claim violations of his or her own constitutional rights under § 1983 for unlawfully, government-imposed injuries to a spouse that have a devastating impact on their marriage”).

85. 125 U.S. 190 (1888).

“the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>86</sup> Later, in 1965, the Court held in *Griswold v. Connecticut*<sup>87</sup> that a Connecticut law forbidding the use of contraceptives was unconstitutional because it intruded upon the constitutional realm of privacy that protects the marriage relationship.<sup>88</sup> In so holding, the *Griswold* Court found the privacy of marriage to be just as important as the marriage relationship itself.<sup>89</sup> As Justice Douglas stated,

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>90</sup>

*Griswold* ultimately established that a realm of sexual privacy protects the marriage relationship.<sup>91</sup> While consortium includes other relationship aspects in addition to sexual relations, such as companionship, society, assistance, support and friendship, the sexual aspect of marriage is undoubtedly substantial.<sup>92</sup> While Section 1983 does not allow for derivative claims, that point has no consequence in this context; a spouse’s independent and personal constitutional rights are infringed upon when the

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86. *Id.* at 205, 211 (discussing legal and social importance of marriage relationship).

87. 381 U.S. 479 (1965).

88. *See id.* at 485-86 (discussing reasoning behind protected realm of privacy surrounding marriage relationship).

89. *See id.* at 486 (discussing holding of case).

90. *Id.* at 486. For a discussion of how the Supreme Court’s view of marriage helps the valid state objective of promoting stable families, see *infra* notes 127-35 and accompanying text.

91. *See id.* at 485-86 (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”). Ultimately, the *Griswold* Court found that the right of spouses to privately choose for themselves to use contraception was a penumbral right of privacy created by several overlapping fundamental constitutional rights. *See id.* at 485 (“The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.”).

92. *See Parker, supra* note 16, at 40-42 (defining spousal consortium and explaining that interference with spouse’s right to consortium violates not only natural right but also spouse’s legal right arising out of marriage relationship). Indeed, the substantial sexual aspect of a loss of spousal consortium claim speaks to the historic common law view of procreation as the primary purpose of marriage. *See Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (stating that “[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis”); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (finding that “our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children”). For a further discussion of the interplay between the sexual aspect of a loss of spousal consortium claim and the traditional views of the purposes of marriage, see *infra* notes 127-35 and accompanying text.



other spouse's injuries have a devastating impact on the marriage and private aspects of the marriage relationship.<sup>93</sup>

B. *Pahle v. Colebrookdale Township: The Eastern District of Pennsylvania's "Common Sense" Approach to Loss of Spousal Consortium*

Courts that find a constitutional right to spousal consortium have also found that legislative history and the spirit of Section 1983 permit loss of spousal consortium claims under that provision.<sup>94</sup> In *Pahle v. Colebrookdale Township*,<sup>95</sup> for example, the United States District Court for the Eastern District of Pennsylvania found that a spouse had the right to assert her loss of consortium claim under Section 1983.<sup>96</sup> In reaching such a conclusion, the court relied on the Ku Klux Klan Act of 1871,<sup>97</sup> which provided the legislative foundation for 42 U.S.C. § 1983.<sup>98</sup> In *Pahle*, plaintiff Ted Pahle was severely injured and became permanently disabled as the result of improper officer conduct in the course of a drunk driving arrest.<sup>99</sup> Pahle sued the township's police department under Section 1983.<sup>100</sup> His wife, Lynn Pahle, also sued under Section 1983 for loss of spousal consortium and direct interference with her constitutional rights of marital integrity and spousal association.<sup>101</sup>

The court held that Lynn Pahle's claim was properly brought under Section 1983, and found that "a spouse may assert a claim under 1983 that the government improperly interfered with her personal right to the services, society and companionship of her husband (i.e., consortium), denying her Due Process of law, to which she is entitled under the Fourteenth Amendment."<sup>102</sup> In reaching this conclusion, the court emphasized the

93. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002) (likening claim of spouse for deprivation of consortium without due process of law to claim of parent for deprivation of consortium of their child without due process of law, which is valid claim in Third Circuit).

94. See *Dist. of Columbia v. Carter*, 409 U.S. 418, 423-25 (1973) (holding that analysis of purposes of Section 1983 must "take cognizance of the events and passions of the time at which it was enacted. . . . [Section] 1983 has its roots in [Section] 1 of the Ku Klux Klan Act of 1871, Act of Apr. 20, 1871"); *Pahle*, 227 F. Supp. 2d at 382 (finding that legislative history of Section 1983 in Ku Klux Klan Act of 1871 supports compensating wife for loss of husband's consortium).

95. 227 F. Supp. 2d 361 (E.D. Pa. 2002).

96. See *id.* at 382 (discussing holding of case).

97. Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871) (prohibiting state interference with civil rights and private action denying equal protection).

98. See *Pahle*, 227 F. Supp. 2d at 382-83 (citing Seventh Circuit's analysis of legislative history of Section 1983 where Seventh Circuit found right for spouse to assert loss of consortium claims under Section 1983); see also *Carter*, 409 U.S. at 423 (discussing roots of Section 1983 in Ku Klux Klan Act of 1871).

99. See *Pahle*, 227 F. Supp. 2d at 365-66 (discussing facts of case).

100. See *id.* at 364 (discussing husband's claim in case).

101. See *id.* (discussing wife's claim in case).

102. *Id.* at 380 (finding that plaintiff brought valid loss of spousal consortium claim under Section 1983).

legislative history of Section 1983 as specifically found in the Ku Klux Klan Act of 1871.<sup>103</sup> The Act was read as intending “in part, to compensate a wife for what she lost—that is, a vindication of her own rights—when her husband was injured through unlawful government action.”<sup>104</sup> The Act’s own legislative history states:

This is what we offer to the people of the United States as a remedy for wrongs, arsons and murders done. This is what we offer to a man whose house has been burned, as a remedy; *to a woman whose husband has been murdered, as a remedy*; to the children whose father has been killed, as a remedy.<sup>105</sup>

### C. *The History and Spirit of Section 1983 as Protecting Spousal Consortium*

The Ku Klux Klan Act shows that the right to be peaceful in one’s closely held personal relationships, both as between spouses and between parents and children, is of the utmost importance in United States history.<sup>106</sup> Therefore, when translated into rights actionable under 42 U.S.C. § 1983, just as the right to be secure in one’s own person and the right to have and raise children are actionable civil rights claims if violated, the right to have and enjoy a relationship with one’s spouse is actionable as well.<sup>107</sup> Courts that use this interpretation of Section 1983 give a more logical reading to the statute and give full credit to the history, spirit and specific Supreme Court case law enumerating substantive rights protected by the Constitution.<sup>108</sup>

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103. See *id.* at 382 (discussing legislative history of 42 U.S.C. § 1983).

104. *Id.* (holding Ku Klux Klan Act to be relevant to loss of spousal consortium claims under 42 U.S.C. § 1983).

105. CONG. GLOBE, 42d Cong., 1st Sess. 807 (1871) (emphasis added); see also *Pahle*, 227 F. Supp. 2d at 382 (interpreting legislative history of Ku Klux Klan Act).

106. See *Pahle*, 227 F. Supp. 2d at 382-83 (reasoning that spirit of Ku Klux Klan Act supports finding right to spousal consortium).

107. See *id.* (interpreting legislative history of Ku Klux Klan Act as reason to allow plaintiffs to bring loss of spousal consortium claims under 42 U.S.C. § 1983).

108. See, e.g., *Flores v. Cameron County*, 92 F.3d 258, 271 (5th Cir. 1996) (finding loss of consortium available under Section 1983 when spouse, parent or child suffers actionable physical injury in cases in which Texas state law governs); *Crumpton v. Gates*, 947 F.2d 1418, 1422-23 (9th Cir. 1991) (child can recover, as of date of his birth, under Section 1983 for unwarranted interference with his rights to familial consortium after unlawful shooting of father by police); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1223 (7th Cir. 1984) (finding spouse has right to assert loss of consortium claim under Section 1983), *overruled by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (overruling *Bell* “insofar as it recognized a constitutional right to recover for the loss of companionship of an adult child when that relationship is terminated as an incidental result of state action”); *Pahle*, 227 F. Supp. 2d at 383 (holding that wife can assert claim for loss of husband’s consortium under Section 1983); *Robinson v. Johnson*, 975 F. Supp. 950, 955 (S.D. Tex. 1996) (finding loss of consortium available under Section 1983 when spouse, parent or child suffers actionable physical injury). But see *Harbury v. Deutch*, 233 F.3d 596, 604-06 (D.C. Cir. 2000) (refusing to extend constitutional right of familial association to case in which government indirectly interfered with spousal relationship by allegedly mur-

## IV. FIRST COMES. . . BABY?

The second argument for finding loss of spousal consortium claims to be properly brought under Section 1983 is one of logic.<sup>109</sup> Without a right to bring spousal consortium claims under Section 1983, an illogical outcome results; parents can bring a loss of consortium claim under Section 1983 for their children, yet spouses cannot bring consortium claims for their husbands or wives under the same statute.<sup>110</sup> The discord of this result is especially apparent upon examination of the origin of loss of parental consortium claims.<sup>111</sup>

## A. Parental Consortium: "Offspring" of Spousal Consortium

While not all jurisdictions currently recognize the right of a parent or child to sue for loss of consortium, the number of jurisdictions that do has steadily increased since Wisconsin first recognized this right in *Shockley v.*

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dering woman's husband, noting that *Bailey* and *Bell* decisions tend to disagree); *Trujillo v. Bd. of County Comm'rs of the County of Santa Fe*, 768 F.2d 1186, 1190 (10th Cir. 1985) (disagreeing with *Bell*, holding that allegation of intent to interfere with particular relationship protected by freedom of association is required to state claim under Section 1983); *Helleloid v. Indep. Sch. Dist. No. 361*, 149 F. Supp. 2d 863, 877 (D. Minn. 2001) (holding that parents of child suing school district for sexual abuse of their child could not recover under Section 1983 because they were not target of district's actions); *Winton v. Bd. of Comm'rs of Tulsa County*, 88 F. Supp. 2d 1247, 1254 (N.D. Okla. 2000) (finding no constitutional right to spousal consortium, therefore spouse not entitled to Section 1983 claim for loss of husband's consortium); *Walters v. Vill. of Oak Lawn*, 548 F. Supp. 417, 419 (N.D. Ill. 1982) (concluding that loss of consortium does not rise to constitutional level). For a further discussion of the rationale of courts that do not find a right for a spouse to assert a loss of consortium claim under Section 1983, see *supra* notes 36-81 and accompanying text.

109. For a discussion of the Supreme Court authority protecting familial relationships and marriage in general, see *supra* notes 82-93 and accompanying text.

110. See, e.g., *Harbury*, 233 F.3d at 605-06 (holding that there is no constitutional right to spousal consortium, but there is constitutional right to parental consortium); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990) (finding that although Supreme Court has recognized constitutional protection for rights to marry, to have children and to direct their education and upbringing, Court has never sanctioned constitutional protection of consortium); *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) (finding no constitutional right to spousal consortium despite Third Circuit holding that constitutional right to parental consortium exists); *Colburn v. City of Phila.*, No. CIV. A. 00-2781, 2001 WL 872960, at \*2 (E.D. Pa. Apr. 11, 2001) (same); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (same); *Verde v. City of Phila.*, 862 F. Supp. 1329, 1337 (E.D. Pa. 1994) (same).

111. See *Shockley v. Prier*, 225 N.W.2d 495, 497-99 (Wis. 1975) (finding that "the common-law rule [where loss of consortium does not exist in the parent-child relationship] no longer fits the social realities of the present day," thus, rule allowing parents to recover for loss of consortium of their children is "closer to our present day family ideal"); see also *Parker*, *supra* note 16, at 38-42 (chronicling early cases discussing common law claim of loss of consortium); *Perry*, *supra* note 8, at 36 (finding that, as of 2003, expanding loss of consortium claim to parent-child relationship is still relatively recent development).

*Prier*.<sup>112</sup> In *Shockley*, plaintiff parents Benjamin and Marion Shockley al-

112. 225 N.W. 2d 495, 499 (Wis. 1975) (concluding that parents now have right to bring claims for loss of their children's consortium). In so finding, the *Shockley* court noted, "the law should recognize the right of parents to recover for loss of aid, comfort, society and companionship of a child during minority when such loss is caused by the negligence of another." *Id.* (explaining policy behind rights). Indeed, the emotional importance of the parent-child relationship is now widely recognized, and as a consequence, the legal right of parental consortium claims is steadily expanding. *See, e.g.,* Hibpshman v. Prudhoe Bay Supply, Inc., 734 P.2d 991, 994-97 (Alaska 1987) (holding that minor children had independent cause of action for loss of parental consortium resulting from injuries tortiously inflicted on their parent by third party); Villareal v. Ariz. Dep't of Transp., 774 P.2d 213, 216-20 (Ariz. 1989) (finding that child can bring loss of consortium claim resulting from father's death in motorcycle accident); Frank v. Superior Court of Ariz., 722 P.2d 955, 958-60 (Ariz. 1986) (finding that parents have cause of action for loss of consortium under Arizona law against third party who injures their adult child); Weilt v. Moes, 311 N.W.2d 259, 261-73 (Iowa 1981) (holding that minor has independent cause of action in Iowa for loss of companionship of parent who is tortiously injured by third party so as to cause significant disruption of parent-child relationship), *overruled by* Audubon-Exira Ready Mix, Inc. v. Ill. Cent. Gulf R.R. Co., 335 N.W.2d 148, 152 (Iowa 1983) (limiting child's damages claim for loss of parental consortium to period of child's minority); Berger v. Weber, 303 N.W.2d 424, 425 (Mich. 1981) (finding that child has independent cause of action for loss of parental consortium when parent is negligently injured); Lester v. Sayles, 850 S.W.2d 858, 871 (Mo. 1993) (holding most important consideration in calculating damages owed to mother when daughter was injured in train accident was mother's deprivation of enjoyment of daughter's consortium); Keele v. St. Vincent Hosps. & Health Care Ctr., 852 P.2d 574, 576-78 (Mont. 1993) (holding that in Montana, minor child can establish claim for loss of parental consortium by showing mental or physical impairment so severe that it causes parent-child relationship to be destroyed or nearly destroyed); Davis v. Elizabeth Gen. Med. Ctr., 548 A.2d 528, 532 (N.J. Super. Ct. 1988) (holding that parents were entitled to award of \$50,000 for loss of child's consortium under New Jersey law), *overruled by* Tynan v. Curzi, 753 A.2d 187 (N.J. Super. Ct. App. Div. 2000) (overruling *Davis* insofar as it extends parents' right to recovery "beyond that permitted by common law"); Gallimore v. Children's Hosp. Med. Ctr., 617 N.E.2d 1052, 1057 (Ohio 1993) (holding that parent may recover damages in action against third-party who causes physical injury to parent's minor child, for loss of consortium); Norvell v. Cuyahoga County Hosp., 463 N.E.2d 111, 114-15 (Ohio Ct. App. 1983) (holding that parents of minor child injured may recover compensation for loss of child's consortium); Williams v. Hook, 804 P.2d 1131, 1133-38 (Okla. 1990) (holding that minor children or incapacitated dependent children may maintain cause of action for permanent loss of parental consortium when third party injures parent); Reagan v. Vaughn, 804 S.W.2d 463, 465-66 (Tex. 1990) (holding that children may recover for loss of parental consortium when third party causes disabling injuries to their parent); Hay v. Med. Ctr. Hosp. of Vt., 496 A.2d 939, 942 (Vt. 1985) (finding that minor child has right to sue for damages for loss of parental consortium); Adcox v. Children's Orthopedic Hosp., 864 P.2d 921, 932-33 (Wash. 1993) (holding that recovery of damages by mother for impact son's medical injuries had on mother-son relationship, among other things, was appropriate); Ueland v. Reynolds Metals Co., 691 P.2d 190, 195 (Wash. 1984) (expanding loss of consortium claim so that child has independent right of action for loss of parent's consortium); Belcher v. Goins, 400 S.E.2d 830, 841 (W. Va. 1990) (holding that any minor or physically or mentally handicapped child who is dependent on parent may maintain cause of action for loss or impairment of parental consortium against third person); Nulle v. Gillette-Campbell County Joint Powers Fire Bd., 797 P.2d 1171, 1176 (Wyo. 1990) (finding that "minor children have independent

leged loss of consortium of their son Paul due to negligent conduct during Paul's birth that left him blind and disfigured.<sup>113</sup> The Wisconsin Supreme Court held that the plaintiff could recover, reasoning that the traditional claim allowing parents economic recovery for the loss of wages of their injured children is not particularly relevant because "the family relationship has changed. Society and companionship between parents and their children are closer to our present day family ideal than the right of the parents to the 'earning capacity during minority,' which once seemed so important. . . ."<sup>114</sup> In the modern world it is more rational to allow parents to recover for the loss of enjoyment in shared experiences, society and companionship of their children.<sup>115</sup>

As authority to persuade courts to find loss of consortium claims valid in the parent-child context, those arguing the matter have relied almost exclusively by analogy on the loss of spousal consortium claim long recognized at common law.<sup>116</sup> Many have noted that under the language of this traditional state law claim, virtually every aspect of the spousal relationship applies equally to the parent-child relationship.<sup>117</sup> The single exception is

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claim for loss of parental consortium resulting from injuries tortiously inflicted on their parent by third person"). *But see* Dep't of Pub. Welfare v. Schultz, 855 A.2d 753, 755 (Pa. 2004) (finding no right to assert loss of parental consortium under Pennsylvania law).

113. *See Shockley*, 225 N.W.2d at 496-97 (discussing facts of case).

114. *Id.* at 499 (reasoning that claim for loss of parental consortium should now exist).

115. *See id.* (giving parents right to claim loss of parental consortium by analogy due to realities of modern day world). It is a fact of both modern psychological and legal knowledge that the parent-child relationship is one of society's most important relationships, as one legal scholar has noted:

It is common knowledge that a parent who suffers serious physical or mental injury is unable to give his minor children the parental care, training, love and companionship in the same degree as he might have but for his injury . . . when the vitally important parent-child relationship is impaired and the child loses the love, guidance and close companionship of a parent, the child is deprived of something that is indeed valuable and precious.

Parker, *supra* note 16, at 48 (describing harm to parent-child relationship when parent is injured). Although California does not recognize a right to claim loss of parental consortium, the California Supreme Court has observed:

Plaintiff's claim, viewed in the abstract and divorced from its surroundings, carries both logical and sympathetic appeal . . . [c]ertain aspects of [the] spousal relationship are similar to those of the parent-child relationship, and there can be little question of the reality of the loss suffered by a child deprived of the society and care of its parent.

*Id.* (quoting *Borer v. Am. Airlines, Inc.*, 563 P.2d 858, 862 (Cal. 1977)) (discussing claim for loss of spousal consortium as similar to child's claim for loss of parent's consortium).

116. *See* Parker, *supra* note 16, at 48 (noting common source of argument to recognize loss of parental consortium claim was well-recognized loss of spousal consortium claim).

117. *See id.* (defining spousal consortium and chronicling analogy that established parental consortium claims); Perry, *supra* note 8, at 36 (noting similarities between loss of spousal consortium and loss of parental consortium claims).

the aspect of sexual relations, which exists within the realm of the spousal relationship, but not as between parents and children.<sup>118</sup>

By finding a loss of consortium claim to be feasible in the parent-child context, courts have necessarily found spousal consortium extends beyond the loss of sexual services, including elements of personal relationships that provide emotional satisfaction and stability.<sup>119</sup> Thus, the aspects of marriage that are protected by the Constitution in cases such as *Griswold* and *Maynard*, largely shape the aspects of spousal consortium as well.<sup>120</sup>

Courts that have interpreted the constitutional protection of marriage in this manner have concluded that spousal consortium claims can be properly brought under 42 U.S.C. § 1983.<sup>121</sup> As the Eastern District of Pennsylvania stated in *Pahle v. Colebrookdale Township*:

Though the [Supreme] Court has most often spoken of marriage in connection with the right to privacy, we believe the Supreme Court's language concerning the institution is equally apt when applied to the Due Process rights implicated. . . [in loss of con-

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118. See Perry, *supra* note 8, at 36 (noting latest expansion of loss of consortium claims to parent-child relationship). Perry elaborates:

In recent years, some states have even expanded the claim for loss of consortium beyond spouses, permitting suits where the injury of a child damages the quality of enjoyment of the parent-child relationship. Courts formerly refused to recognize such claims because, among other reasons, they believed that an important element of the consortium claim was the loss of sexual services. The fact that some courts have begun to move beyond this view provides further support for the position that the claim for loss of consortium need not be rooted in the duty of marital services at all.

*Id.* (discussing loss of consortium claims); see also Parker, *supra* note 16, at 40-42 (tracking evolution of loss of consortium claim from one made only by husband for economic loss of his wife, to one made by either spouse for emotional, social and sexual loss of other, to one expanded as to children to recover for loss of consortium of their negligently injured parent).

119. See *Shockley*, 225 N.W.2d at 497-99 (finding that "the common-law rule [where loss of consortium does not exist in the parent-child relationship] no longer fits the social realities of the present day" thus, rule allowing parents to recover for loss of society of their children is "closer to our present day family ideal"). For a further discussion of the expansion of the loss of consortium claim, see *supra* notes 17-19, 23-26 and accompanying text.

120. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that private decisions by married couples, such as whether to use contraception, are protected by realm of sexual privacy in which government should not interfere); *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as "the most important relation in life" and "the foundation of the family and of society, without which there would be neither civilization nor progress"); Parker, *supra* note 16, at 41-42 (defining spousal consortium as emotional, social, physical companionship, society and support of one spouse to another).

121. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 382 (E.D. Pa. 2002) (finding that logical extension of Supreme Court protection of marriage relationship, in addition to Third Circuit holding claims for loss of parental consortium proper under Section 1983, dictate that claims for loss of spousal consortium under Section 1983 also proper).

sortium claims under Section 1983]: marital integrity and spousal association.”<sup>122</sup>

Therefore, consortium is already protected by the Constitution, and a spouse, just as a parent, can rightly bring a loss of consortium claim under Section 1983.<sup>123</sup> Furthermore, any court that finds a constitutional right to parental consortium should logically find a constitutional right to spousal consortium.<sup>124</sup> Some of these courts, in defending their reasoning that a parental consortium right is protected by the Constitution while a spousal consortium right is not, have claimed that they seek “neither to minimize the loss of a family member nor to denigrate the fundamental liberty interest in matters of family life that have long been a part of our constitutional fabric.”<sup>125</sup> Unfortunately, these courts do exactly that; for

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122. *Id.* (discussing marriage rights previously held by Supreme Court to be protected by substantive due process).

123. *See id.* (finding that Supreme Court holdings protecting substantive due process rights involving marriage protect spousal consortium as well). Several courts, while not having expressly ruled on the issue of loss of spousal consortium claims under Section 1983, have used language in holding the analogous parental consortium claims valid. This strongly suggests spousal consortium claims under Section 1983 would also be valid in these jurisdictions. *See, e.g.,* *Flores v. Cameron County*, 92 F.3d 258, 271 (5th Cir. 1996) (applying Texas law to find loss of consortium available under Section 1983 when spouse, parent, or child suffers actionable non-fatal physical injury); *Rhyne v. Henderson County*, 973 F.2d 386, 391 (5th Cir. 1992) (“Rhyne has standing to recover for *her own injuries* arising out of the wrongful death of her son.”) (emphasis added); *Crompton v. Gates*, 947 F.2d 1418, 1422-23 (9th Cir. 1991) (holding that child can recover, as of date of his birth, under Section 1983 for unwarranted interference with his rights to familial consortium after unlawful shooting of father because of constitutional protection of family); *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (finding parent can recover for loss of child’s consortium under Section 1983 because *all* family relationships are constitutionally protected), *overruled by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (overruling *Bell* “insofar as it recognized a constitutional right to recover for the loss of companionship of an adult child when that relationship is terminated as an incidental result of state action”); *Robinson v. Johnson*, 975 F. Supp. 950, 954 (S.D. Tex. 1996) (“[P]arent may recover damages for ‘mental anguish, suffering and loss of companionship, contribution, society, affection and comfort’ in a [Section] 1983 action based on the violation of her child’s civil rights that resulted in his death.”) (quoting *Flores*, 92 F.3d at 271).

124. *See Pahle*, 227 F. Supp. 2d at 382 (finding that logical extension of Supreme Court protection of marriage relationship, in addition to Third Circuit holding claims for loss of parental consortium proper under Section 1983, dictate that claims for loss of spousal consortium under Section 1983 also proper). *But see Harbury v. Deutch*, 233 F.3d 596, 606 (D.C. Cir. 2000) (recognizing existing constitutional right to parental consortium, but declining to expand to context of spousal consortium); *Wiers v. Barnes*, 925 F. Supp. 1079, 1095-96 (D. Del. 1996) (holding that “there is no authority to consider a loss of consortium claim deriving from a claim of injury by an uninjured spouse brought pursuant to 42 U.S.C. § 1983,” despite Third Circuit holding that father can assert claim for loss of child’s consortium under Section 1983).

125. *See Harbury*, 233 F.3d at 606 (quoting *Ortiz v. Burgos*, 807 F.2d 6, 9 (1st Cir. 1986)) (explaining that First Circuit declined to expand substantive constitutional rights to protect spousal consortium).

they fail to follow the protected parent-child relationship back to its historical origin, essentially striking a blow to the major role that the marriage relationship plays in society.<sup>126</sup>

### B. *Spousal Consortium as the Context for Parental Rights*

Spousal consortium entitles each spouse to the “comfort, companionship, and affection of the other.”<sup>127</sup> Without marital privacy, which includes the decision and desire to have children in the first place, the parent-child relationship becomes either extinct or meaningless.<sup>128</sup> It may be true that spousal consortium and marriage are not precisely the same thing; in practice, however, a successful marriage cannot exist without the previously named aspects of consortium, and without a successful marriage, the attributes of the parent-child relationship courts seek to protect simply do not exist.<sup>129</sup>

Historically, the Supreme Court intended the constitutional rights of having and raising children to be used within the context of marriage.<sup>130</sup>

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126. For a further discussion of why marriage should come before children not only in the traditional family chronology, but legally, as courts have historically supported the traditional family unit and the stable family environment as the ideal for raising children, see *infra* notes 130-35 and accompanying text.

127. Parker, *supra* note 16, at 41-42 (defining consortium as it applies in both spousal and parental context).

128. See *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (holding realm of marital privacy to be constitutionally protected). As Supreme Court Justice Goldberg aptly put it in his concurring opinion in *Griswold*:

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected. . . . The fact that no particular provision of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

*Id.* at 495-96 (discussing constitutional basis of fundamental personal rights).

129. See *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983) (holding that marriage is most desirable context to raise children). The Court in *Lehr* found that: Varied state laws [that govern] marriage and divorce affect a multitude of parent-child relationships. The institution of marriage has played a critical role both in defining the legal entitlements of family members and in developing the decentralized structure of our democratic society. In recognition of that role, and as part of their general overarching concern for serving the best interests of children, state laws almost universally express an appropriate preference for the formal family.

*Id.* (discussing state laws that recognize marriage as important to family relationship); see also *Trimble v. Gordon*, 430 U.S. 762, 769 (1977) (“No one disputes the appropriateness of Illinois’ concern with the family unit, perhaps the most fundamental social institution of our society.”).

130. See *Lehr*, 463 U.S. at 261 (holding that marriage promotes way of life desirable to society at large). The *Lehr* Court found marriage to be much more



The Court has not promoted and protected the right to have children *per se*.<sup>131</sup> Instead, the Court has historically promoted the raising of children in a stable family environment.<sup>132</sup>

In fact, courts have long viewed procreation as a primary purpose of marriage.<sup>133</sup> Thus, at a time when out-of-wedlock births and divorces are on the rise, and a decline has been detected in the incidence of two-parent homes, the protection of marriage as the foundation of the traditional

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than simply a legal status, for marriage is the foundation of families, which are fundamentally important to our society:

[T]he mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children as well as from the fact of blood relationship."

*Id.* (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)) (describing critical role of family).

131. See *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (holding that having biological offspring does not automatically confer parental rights). The *Caban* Court also saw the importance of a marriage foundation in establishing parental rights:

Even if it be assumed that each married parent after divorce has some substantive due process right to maintain his or her parental relationship, . . . it by no means follows that each unwed parent has any such right. Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.

*Id.* (finding that unwed parents may have less substantive rights in their children than married parents). The *Caban* court further noted that the relationship between a father and biological child may acquire constitutional protection if the father enters into a traditional marriage with the mother or if "the actual relationship between father and child" is sufficient. See *id.* (noting that primary indicia of parental relationship is participation in traditional family unit).

132. See *Lehr*, 463 U.S. at 256-57 (finding marriage to be foundation of those family relationships desirable to society). The *Lehr* Court went on to note that "[i]n some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships." *Id.* at 257 (explaining different levels of constitutional protections); see *In re Kandu*, 315 B.R. 123, 139-40, 148 (Bankr. W.D. Wash. 2004) (noting that government has interest in promoting stable families); Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*, 40 TULSA L. REV. 381, 390 (2005) (discussing how state interest in promoting stable families creates rational basis for state bans on same-sex marriage).

133. See *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971) (holding that "[t]he institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis"); *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) (finding that "our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children"); Perry, *supra* note 8, at 30 (noting "there are many cases that make it clear that courts have long viewed procreation as a primary purpose of marriage").

family is especially important.<sup>134</sup> As a matter of practice and policy, courts should recognize a federal right to spousal consortium as an aspect of that traditional family unit the Supreme Court has historically held to be constitutionally protected, and is the very basis of our culture and society.<sup>135</sup>

C. *Marriage as a Legal Status, Not an Amorphous Family Relationship*

Some courts that fail to recognize an existing right to spousal consortium under the Constitution and Section 1983 point to line drawing issues regarding which of the many different types of intimate and familial relationships should be constitutionally protected.<sup>136</sup> This argument states

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134. See Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 300-03 (2001) (stating desirability of marriage as context to rear children). Another commentator has noted:

It is often argued that marriage is the most desirable context for the rearing of children, and many argue that marriage is also the most beneficial social arrangement for the well-being of adults based on arguments that it provides economic protection and enhances physical and emotional well-being.

Perry, *supra* note 8, at 34 n.125 (presenting arguments in favor of marriage); see also Nat'l Ctr. for Policy Analysis: Idea House, *supra* note 10 (noting that "[a]s a proportion of all households, married-couple households with children declined from 40 percent to 26 percent between 1970 and 1990" and "the percentage of single-parent families in the U.S. doubled between 1970 and 1990—from 6 percent to 12 percent of all families and from 11 percent to 24 percent of all households").

135. See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (discussing importance of constitutional protection of family relationships). The *Moore* court noted that its "decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.* (explaining reason for constitutional protection of family relationship); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (noting "Court's historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment") (summarizing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (emphasizing that "the traditional relation of the family . . . [is] a relation as old and as fundamental as our entire civilization"); *Poe v. Ullman*, 367 U.S. 497, 551-52 (1961) (Harlan, J., dissenting) ("The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right."); *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944) (recognizing history of Supreme Court decisions that have respected private realm of family life that state cannot enter); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding Fourteenth Amendment protects freedom to marry, establish home and bring up children).

136. See *Ortiz v. Burgos*, 807 F.2d 6, 9-10 (1st Cir. 1986) (declining to expand loss of consortium claims under Section 1983 to spousal context). The *Ortiz* court, in justifying its decision, noted:

[T]he problem of giving definition and limits to a liberty interest in this vast area seems not only exceedingly difficult but to a considerable extent duplicative of the widespread existence of state causes of action, as in this case, which provide some compensation to grieving relatives. . . . [W]e emphasize that in denying a cause of action to appellants, we seek neither

that the line as to what intimate relationships are protected by the Constitution must be drawn somewhere, and while all family relationships are important, the one between parents and children is the only one afforded constitutional protection.<sup>137</sup> Even within the context of this reasoning, recognizing spousal consortium as constitutionally protected does not present any line drawing issues because marriage is a readily identified legal status; one very clearly is or is not legally married.<sup>138</sup>

Identifying the constitutional right to spousal consortium does not imply that any other familial relationships should be protected.<sup>139</sup> While

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to minimize the loss of a family member nor to denigrate the fundamental liberty interest in matters of family life that has long been a part of our constitutional fabric. . . . [O]ur conclusion is simply that, in light of the limited nature of the Supreme Court precedent in this area, it would be inappropriate to extend recognition of an individual's liberty interest in his or her family or parental relationship to the facts of this case.

*Id.* (explaining decision not to recognize loss of spousal consortium claim); see also *Harbury v. Deutch*, 233 F.3d 596, 606 (D.C. Cir. 2000) (finding no right to assert loss of spousal consortium claim under Section 1983). The *Harbury* court thought substantive constitutional rights must be delineated with precision:

Harbury's claim thus lies beyond Supreme Court precedent in not one but two respects: it concerns neither a parent-child relationship nor purposeful interference with a familial relationship. On the facts of this case, therefore, we need not decide whether the constitutional right to continuing familial association requires allegations of purpose to interfere with the right, nor whether the constitutional right to familial association extends to the marriage relationship. We hold only that in view of Supreme Court precedent and in light of the Court's admonition in *Collins*, we cannot extend a constitutional right to familial association to cases where, as here, the government has indirectly interfered with a spousal relationship.

*Id.* (providing explanation for holding of case).

137. See *Norcross v. Town of Hammonton*, Civil No. 04-2536 (RBK), 2006 WL 1995021, at \*3 (D.N.J. July 13, 2006) ("While the Supreme Court has recognized constitutional protection for 'rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion,' the Court has never sanctioned constitutional protection of consortium.").

138. See Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 230 (1982) (summarizing marriage statutes). Every state in the country requires that those seeking to marry apply for and sign a marriage license. See HOMER H. CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.3 at 34-44 (2d ed. 1988) (providing jurisdictional summaries of marriage laws, both statutory and common law). Through this requirement, the state authorizes and registers the marriage. See *id.* (same). The couple's relationship also becomes subject to state regulation with respect to legal duties and responsibilities the spouses are deemed to owe each other during the marriage. See *Baehr v. Levin*, 852 P.2d 44, 47 (Haw. 1993) (holding that "marriage is a . . . legal status . . . which gives rise to rights and benefits reserved exclusively to that particular relationship"), superseded by constitutional amendment, HAW. CONST. art. I, § 23 (granting legislature the "power to reserve marriage to opposite-sex couples"), as recognized in *Milberger v. KBHL, LLC*, Civ. No. 05-00297 ACK/KSC, 2007 U.S. Dist. LEXIS 12489, at \*23 n.9 (D. Haw. Feb. 22, 2007).

139. See *Norcross*, 2006 WL 1995021, at \*3 (explaining that Supreme Court has never expressly found constitutional protection of spousal consortium).

the relationships between siblings, cousins, grandparents and blended families all lend themselves to a fact specific and difficult analysis of the level of intimacy in a given relationship, this is not the case in the spousal context.<sup>140</sup> The nature of the relationship itself commands a particularly high level of dependence and intimacy which is entered into voluntarily and can be ended in the same manner.<sup>141</sup> As the Supreme Court stated in *Maynard*,

[w]hen the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract. . . . The reciprocal rights arising from this relation, so long as it continues, are such as the law determines from time to time, and none other.<sup>142</sup>

Thus, the institution of marriage as a legal status preempts the need for undertaking a case-by-case analysis of the level of intimacy present in a particular marriage for the sake of loss of consortium claims.<sup>143</sup> The connection between the right to have children and the desire and decision to have children is inevitable; courts have long recognized the government's interest in promoting stable families.<sup>144</sup> Marriage is the most advantageous environment in which to raise children for many practical reasons, including income, benefits, support and emotional stability, and this fact is recognized and promoted within the court system.<sup>145</sup> If the right to have

140. See *Ortiz*, 807 F.2d at 8 (declining to expand loss of consortium claims under Section 1983 to spousal context).

141. See *Baehr*, 852 P.2d at 59 (holding that legal duties of marriage can be disavowed upon divorce).

142. 125 U.S. 190, 211 (1888) (quoting *Adams v. Palmer*, 51 Me. 480 (1863)).

143. See *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992) (putting forth Supreme Court policy that substantive constitutional rights are to be expanded prudently); *Harbury v. Deutch*, 233 F.3d 596, 606-07 (D.C. Cir. 2000) (citing need for express Supreme Court holding that spousal consortium is constitutionally protected before loss of spousal consortium claims can be brought under Section 1983); *Ortiz*, 807 F.2d at 9 (requiring higher evidentiary showing by plaintiff because lack of express Supreme Court holding that spousal consortium is constitutionally protected).

144. See *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983) (holding that marriage is most desirable context to raise children because it is foundation of traditional family unit). For a further discussion of the Supreme Court authority promoting the traditional and stable family, see *supra* notes 130-35 and accompanying text.

145. See Editorial, *Statistical Census Findings: Traditional Married Couples are Better Off by Any Available Standard*, SALT LAKE TRIB., Aug. 15, 2001, available at <http://www.adherents.com/misc/marriage.html> (finding that children are forty times more likely to be abused by live-in boyfriends than their own parents); Robert E. Rector et al., *Increasing Marriage Would Dramatically Reduce Child Poverty*, May 20,

and raise children is important enough to be raised to the constitutional level, spousal consortium should also be protected to preserve that right the way the Supreme Court and society intend it to be used.<sup>146</sup>

## V. CONCLUSION

The ability to bring a loss of consortium claim in the Third Circuit under 42 U.S.C. § 1983 is important because while economic losses may be recovered in the injured spouse's action, loss of consortium focuses on the intangible, companionate aspects of marriage that are equally, if not more important in the long term.<sup>147</sup> Furthermore, while a state law claim for loss of spousal consortium may be available, denial of the federal remedy and higher consideration given to analogous loss of parental consortium claims is not an appropriate result.<sup>148</sup> When a federal civil rights action

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2003, <http://www.heritage.org/Research/Family/cda0306.cfm> (finding child welfare associated with marital status of parents). Rector and Johnson find that:

Children raised by never-married mothers are seven times more likely to be poor when compared to children raised in intact married families. The obvious nexus between single-parent families and child poverty has led President George W. Bush to propose a new trial program aimed at increasing child well-being and reducing child poverty by promoting healthy marriage.

*Id.* (describing relationship between child poverty and marital status of parents); see also Perry, *supra* note 8, at 34 n.125 ("It is often argued that marriage is the most desirable context for the rearing of children.").

146. See *Lehr*, 463 U.S. at 256-57 (finding that state laws appropriately express clear preference for formal family unit). The *Lehr* court went on to note that "in some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships." *Id.* at 257 (explaining legal and social importance of formal family relationships).

147. See Parker, *supra* note 16, at 41-42 (defining spousal consortium to include comfort, companionship and conjugal society of each spouse to other, explaining that interference with spouse's right to consortium violates not only natural right but also spouse's legal right arising out of marriage relationship); Perry, *supra* note 8, at 32 (discussing realm of sexual privacy that protects marriage relationship).

148. See *Smith v. City of Fontana*, 818 F.2d 1411, 1417-20 (9th Cir. 1987) ("We now hold that this constitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents."), *overruled in part by* *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 n.1 (9th Cir. 1999) (*overruling Nava v. City of Dublin*, 121 F.3d 453, 456 (9th Cir. 1997), which relied on *Smith*; *Nava* held that that "a plaintiff had standing to seek injunctive relief barring the California Highway Patrol's use of chokeholds"); *Estate of Bailey v. County of York*, 768 F.2d 503, 509 n.7 (3d Cir. 1985) (holding that father of child had "cognizable liberty interest in preserving the life and physical safety of his child from deprivations caused by state action, a right that logically extends from his recognized liberty interest in the custody of his children and the maintenance and integrity of the family"); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1242-48 (7th Cir. 1984) (holding that parent whose child has died as result of unlawful state action may maintain action under Section 1983 for deprivation of liberty), *overruled by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (*overruling Bell* "insofar as it recognized a constitutional right to recover

exists, a plaintiff is not required to exhaust all state judicial or administrative remedies prior to pursuing the federal claim.<sup>149</sup> Practical considerations such as the expertise, time and resources available in federal court should be available for both civil rights injuries under Section 1983 and the loss of consortium claims that arise from the same incident.<sup>150</sup> If a federal remedy is not provided for loss of spousal consortium claims under Section 1983, victims are forced to choose between consolidating and bringing all claims in state court, or splitting up claims between state and federal court, which inevitably increases the cost, time and labor devoted to be made whole.<sup>151</sup>

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for the loss of companionship of an adult child when that relationship is terminated as an incidental result of state action").

149. See, e.g., *McNeese v. Bd. of Educ.*, 373 U.S. 668, 671-72 (1963) (finding that purposes of Civil Rights Act include overriding certain kinds of state laws, providing remedy where state law was inadequate and providing federal remedy where state remedy was not available in practice); *Monroe v. Pape*, 365 U.S. 167, 183-84 (1961) (holding that federal remedy provided by Section 1983 is supplementary to state, but state remedy, if any, need not be first sought before federal one is invoked), *overruled in part by* *Monell v. Dep't of Soc. Servs. of the City of N.Y.*, 436 U.S. 658, 663 (1978) ("[W]e now overrule *Monroe v. Pape* . . . insofar as it holds that local governments are wholly immune from suit under § 1983."); *Lane v. Wilson*, 307 U.S. 268, 274-75 (1939) (stating plaintiff not required to pursue state procedure for determining claim of discrimination before commencing action in federal court for damages under federal statute); *City of Fontana*, 818 F.2d at 1414-15 (finding that actions which violate substantive protections of Constitution will give rise to civil rights action regardless of existence or exhaustion of state remedy); *Morrison v. Jones*, 607 F.2d 1269, 1275 (9th Cir. 1979) ("[Defendant's] contention that [plaintiff's] action was defeated because she failed to exhaust her state remedies is . . . legally frivolous. She was not required to exhaust her judicial or administrative remedies before she brought her civil rights action.").

150. Compare *Patsy v. Fla. Int'l Univ.*, 634 F.2d 900, 903 (5th Cir. 1981) (holding that traditionally, when complaining party seeks federal court review of state action, considerations of federalism require exhaustion of state relief before intervention of federal judiciary into dispute where no original federal jurisdiction exists), with *St. Joseph Hosp., A Div. of Sisters of Charity of the Incarnate Word v. Elec. Data Sys. Corp.*, 573 F. Supp. 443, 450-51 (S.D. Tex. 1983) (holding that generally administrative remedies need not be exhausted as prerequisite to action brought under civil rights law such as 42 U.S.C. § 1983). Additionally, there are varying situations in which a federal forum would be preferable to its state counterpart. See, e.g., *Carter v. Gen. Motors Corp.*, 983 F.2d 40, 43 (5th Cir. 1993) (holding Texas statute that prohibited trial court from taxing costs against intervenor in third party action was "displaced" by Federal Rules of Civil Procedure); *Bosse v. Litton Unit Handling Sys.*, 646 F.2d 689, 695 (1st Cir. 1981) (finding that federal district court is bound to follow state law regarding taxation of costs in diversity cases only when federal law is silent).

151. See Ann Althouse, *Tapping the State Court Resource*, 44 VAND. L. REV. 953, 955 (1991) (finding that state courts may not equal federal courts in expertise in federal law as well as enthusiasm for federal rights). Althouse notes that Justice Stevens finds that "federal courts 'have a primary obligation to protect the rights of the individual that are embodied in the Federal Constitution' [and] generally should not eschew this responsibility based on some diffuse, instrumental concern for state autonomy." *Id.* at 954 (Stevens, J., concurring) (quoting *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 28 (1989), *overruled by* *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996)) (describing role of federal courts); see also Robert J. Witte,

United States Representative Marilyn Musgrave has said that “[w]ithout traditional marriage, it is hard to see how our community will be able to thrive.”<sup>152</sup> With an institution so important to our culture, it is plain to see why the Supreme Court has been explicitly protecting the marriage relationship since 1888.<sup>153</sup> It has been said that rights and remedies should be equal, and courts should strive to create legal recourse in which the remedy is no narrower than the substantive right that invokes it.<sup>154</sup> Marriage is truly the foundation of society as the Supreme Court has so held, and the Third Circuit should find that a federal remedy for loss of spousal consortium claims is not only appropriate, but is necessary.<sup>155</sup>

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... Or Would You Rather Have What's Behind Door Number Two? *Uniform Choice of Law Proposals: Big Deal of the Day or Just Another Zonk?*, 59 J. AIR L. & COM. 617, 652 (1993) (explaining that consolidating claims in federal court allows utilization of federal expertise away from parochial interests of states). Unfortunately, splitting claims between federal and state court is a likely outcome for spouses who wish to pursue the initial civil rights claim in federal court, because consolidation tools such as pendent party jurisdiction are frequently unavailable in these situations. See *Finley v. United States*, 490 U.S. 545, 553-55 (1989) (reaffirming Supreme Court's unwillingness to apply pendent party jurisdiction in wrongful death action), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. 101-650, 104 Stat. 5089, *as recognized in* *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 556 (2003); *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 375-76 (1978) (limiting scope of pendent party jurisdiction, barring plaintiff in diversity action to append non-diverse parties); *Stallworth v. City of Cleveland*, 893 F.2d 830, 838 (6th Cir. 1990) (finding pendent party jurisdiction does not reach spouse's claim for loss of consortium under Section 1983, so claim cannot be brought in federal court).

152. See *A Proposed Constitutional Amendment to Preserve Traditional Marriage: Before S. Comm. On Judiciary*, 108th Cong. 18 (2004) (statement of Rep. Marilyn Musgrave, Member, House of Reps.) (quoting Rev. Richard Richardson) (proposing that Federal Marriage Amendment to Constitution is necessary to protect traditional marriage in addition to expressly prohibiting gay marriage).

153. See *Maynard v. Hill*, 125 U.S. 190, 205, 211 (1888) (describing marriage as “the most important relation in life” and “the foundation of the family and of society, without which there would be neither civilization nor progress”).

154. See DAN B. DOBBS, *REMEDIES: DAMAGES-EQUITY-RESTITUTION* § 1.2, at 3 (2d ed., 1973) (finding congruence between rights and remedies important in selection of remedy); Parker, *supra* note 16, at 49-50 (noting that “[c]ourts, as nearly as possible, seek to maintain a careful and delicate balance between substantive rights and corresponding remedies”).

155. See *Pahle v. Colebrookdale Twp.*, 227 F. Supp. 2d 361, 381 (E.D. Pa. 2002) (holding that rights existing in Third Circuit between parents and children logically extend to spouses, so spouse can assert loss of consortium claim under Section 1983 in light of Supreme Court precedent protecting marriage relationship).